Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

No. 95-721

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE REPUBLIC OF THE PHILIPPINES AND THE PHILIPPINES PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT,

Petitioners,

vs.

WALTER FULLER AIRCRAFT SALES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether, under the facts of this case, the Fifth Amendment's guarantee of due process was violated when the District Court decided the issue of ambiguity of contract without applying the applicable rules of construction and in direct contradiction to the interpretation of the lawyers who drafted the agreement on behalf of both Buyer and Seller; and whether the Fifth Circuit sanctioned a departure by the District Court from the Constitutional requirements of due process of law and from the accepted and usual course of judicial proceedings when it affirmed that decision.

PARTIES TO THE PROCEEDINGS

The Republic of the Philippines and the Philippine Presidential Commission on Good Government were Defendants/Appellants in the Court below. Walter Fuller Aircraft Sales, Inc. was Plaintiff/Appellee in the Court below.

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Petitioner THE REPUBLIC OF THE PHILIPPINES and its PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit filed in this case on July 13, 1995.

OPINION BELOW

This case was tried in the United States District Court for the Northern District of Texas and resulted in a Judgment against Petitioners in the sum of $14,928,457.29. The District Court made lengthy Findings of Facts and Conclusions of Law. Petitioners appealed, and the Fifth Circuit Court of Appeals in a brief, one paragraph Opinion affirmed the Judgment of the District Court. That Opinion is attached hereto as Appendix A. The Findings of Fact and Conclusions of Law of the District Court are attached as Appendix B.

JURISDICTION

Petitioners are a foreign government and one of its agencies. An action against

them may be heard in the United States District Courts, where this case was originally filed, as they are foreign sovereigns as defined in the Foreign Sovereign Immunities Act, 28 United States Code §1602-1611. They were Appellants in this case in the Fifth Circuit below, and its original Opinion and a Judgment were entered on July 13, 1995. This Petition is timely filed within 90 days of that day. 28 U.S.C. §2101(c). The determination of the Trial Court, finding Petitioners liable to Walter Fuller Aircraft Sales as a matter of law, has become final by affirmation of the Fifth Circuit. All aspects of the Judgment below have become final. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 5, set forth in Appendix C.

STATEMENT OF THE CASE

This case arises out of the sale of an aircraft by the Philippine Presidential Commission on Good Government ("the Commission") to a Texas company, Walter Fuller Aircraft Sales, Inc., Plaintiff below. The aircraft had been sequestered by the Commission, which determined that it was part of the ill-gotten gains of a crony of Ferdinand Marcos, prior head of State of the Republic of the Philippines.

The Deed of Sale contained various disclosures and promises by the Commission. The Deed was drafted by counsel for Buyer and Seller and signed by an authorized

agent of Buyer. It recites that the Commission had sequestered the aircraft, that it was registered in the name of a Philippine company, and that the Commission was acting as the conservator in selling it. The Deed also states, at Paragraph V(b):

> "The Seller however, does hereby assume full responsibility, to defend and hold harmless the Buyer from any and all claims of all persons whosoever, including but not limited to adverse claims, charges, liens, and/or possible encumbrances that may be place [sic] on the title by reason of any act, contract or agreement entered into, prior to the date of this Deed of Sale, as the Seller by virtue of this sale has released subject aircraft.

absolutely free from any such claims, for if any there be should arise, such claims are understood ipso facto directed against the proceeds of the sale that is deposited in escrow, and not any more on the aircraft."

Philippine counsel who drafted this agreement on behalf of both Sellers and Buyer testified that it was their understanding of the meaning of this part of the agreement that it limited Buyer's rights against the Sellers to refund of the purchase price in the event of loss of title to the aircraft.

In its decision on Petitioners' Motion to Dismiss, the first Motion of the case, and without notice, hearing, or presentation of evidence, the District Court found that this language limited only those claims presented by third party

adverse claimants, and not any claims that the Buyer, Fuller Aircraft, might have.

Fuller lost title as a result of a case filed by the purported true owner, Faysound, in the United States District Court for the Eastern District of Arkansas. 748 F.S. 1365, Appendix D hereto. Fuller demanded that the Commission defend and indemnify it in that action, which the Commission refused to do. Fuller filed this action for breach of contract and other causes of action in the United States District Court for the Northern District of Texas.

After service of the Summons and Complaint upon them, Petitioners moved to dismiss for lack of jurisdiction under FRCP Rule 12(b)(6), citing the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-1611. The Motion was denied and, in a lengthy opinion, the District Court unilaterally

announced its interpretation of the language of Paragraph V(b) in dispute. It held that the language limited the damages recoverable by third party claimants only, and not Fuller's claims.

The significance of this ruling was that the interpretation of the language of Paragraph V(b) was not in dispute before the Court in that Motion and at that time. Thus the Court's decision on Paragraph V(b) was not necessary for the decision on the Motion to Dismiss. The Court denied the Motion as to both Petitioners, under the Commercial Activities exception to the Foreign Sovereign Immunities Act.

That decision was affirmed in part and reversed in part for further findings by the Fifth Circuit in an interlocutory opinion. 965 F.2d 1375, Appendix E hereto. The District Court's decision on the

reimbursement clause of Paragraph V(b) was pure dictum.

Fuller later moved for Summary Judgment of the issue of the Commission's liability for breach of contract, declaratory relief, and other causes of action. Despite the fact that this Motion was made only on the issue of liability, the District Court reiterated its damages formula and held that the measure of damages was the fair market value of the aircraft and not the return of the purchase price agreed upon by the parties. Again, this Order was made with no notice to the parties, no Motion by any party on that issue, the Court offered no opportunity for any evidence to be presented, no points and authorities were permitted, and no hearing was held.

Petitioners' Motion for Reconsideration was supported by the

Declarations of Philippine counsel for Buyer and the Seller Commission, who stated that their understanding of the terms of Article V(b) limited Fuller's damages for loss of title to return of the purchase price. The Motion to Reconsider was denied.

At trial, Petitioners timely and properly objected to the admission of any testimony on the fair market value of the aircraft on the grounds that it was irrelevant, since the parties had agreed that the return of purchase price was Buyer's remedy. The District Court overruled that objection, noting that the point had been preserved for appeal purposes.

The District Court permitted the lawyers who drafted the language for both Buyer and Seller to testify to its meaning, i.e., that Buyer's damages for loss of

title were limited to recovery of the purchase price paid for the aircraft. This evidence was admitted for the limited purpose of determining the propriety of an award of punitive damages. The Court later struck that testimony. Not surprisingly, given its misinterpretation of the damages limitation provision of the Deed of Sale, the District Court found Petitioners liable for breach of contract and fraud, and held that Buyer's damages, based on the fair market value, were $14,928,457.29, including attorneys' fees, costs, and interest. The Fifth Circuit merely stated that it found no error nor abuse of discretion; and on that basis it affirmed the Judgment of the District Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The procedure followed by the District Court in this case denied Petitioners due process of law guaranteed them under Amendment V to the United States Constitution. It did so by deciding that Article V(b) of the Deed of Sale was unambiguous, but it made that decision without any notice to the parties, without the opportunity to present any evidence, or any points and authorities, or any hearing. Thus when the Court of Appeals affirmed that Judgment, the Court of Appeals sanctioned a departure by the District Court from the Constitutional requirements of due process of law and from the accepted and usual course of judicial proceedings.

Under Texas law regarding interpretation of ambiguous provisions in

contracts, the Court must make the initial determination of whether the contract is ambiguous. In making that determination, the Court must apply the established rules of construction and must find the contract ambiguous when its meaning is uncertain and doubtful, or reasonably susceptible to more than one meaning. Richland Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154, 156 (5th Cir. 1982). Under these rules of construction, the Court must look at the contract as a whole in light of the circumstances existing when it was made, should avoid interpreting it so as to render any provision meaningless, it should harmonize the entire writing, should interpret it against the drafter, and should strictly construe indemnity contracts against the indemnitee. Richland Plantation, supra, 671 F.2d at 156; Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983);

Halliburton Oil Well Cementing Co. v. Paulk, 180 F.2d 79, 83 (5th Cir. 1950) [rehr'g. den.]; Roberts v. Niekert, 730 S.W.2d 339, 340 (1987 Tex. App. Dallas).

Of those rules of construction, the following leap to the eye. No provision should be rendered meaningless. But it is clearly a meaningless provision for Buyer and Seller to agree that third parties to the contract, who are not bound by the decision of the parties themselves, have limited rights to damages. As those parties are not parties to the contract and are not limited by the language of the contract, their rights cannot be affected. The Court of Appeal overlooked this.

Given the circumstances surrounding the signing of the Deed, i.e., the sequestration of the aircraft, the fact that the Commission held the aircraft as conservator, and that the Buyer's lawyer

knew of the dispute in the Philippine Courts, it made sense for the Commission to limit the damages it might owe to the Buyer in the event of loss of title.

The Buyer's lawyer drafted the language in dispute, and it should be interpreted against the Buyer, especially since the Buyer's lawyer admitted that it limited his own client's right to recover above the purchase price it paid.

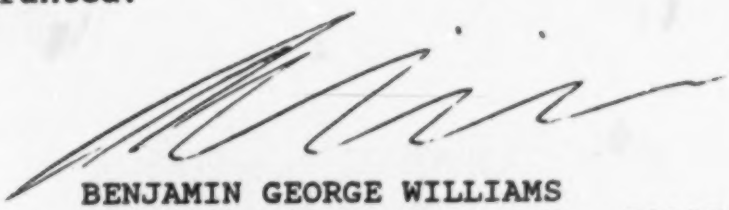
All these rules of construction were disregarded by the District Court, as were the due process rights of Petitioners, when the District Court unilaterally pronounced its interpretation of the Deed without notice, hearing, evidence, or argument.

The Fifth Circuit should have reversed and remanded the case for retrial on the issue of damages and fraud, in light of the denial of due process to Petitioners.

The reason that the case should be remanded for retrial, not only on damages but also on the finding of fraud, is that the District Court prejudged the issue of fraud, finding the Sellers eligible for punitive damages after only deciding a Motion for Summary Judgment on liability for breach of contract, and as a result thereof, it was inevitable that the District Court would conclude that the lawyers for Buyer and Seller were lying about their interpretation of the contract, thus supporting the fraud, simply because their interpretation of the contract differed from the Court's interpretation.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.



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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9153

WALTER FULLER AIRCRAFT SALES, INC.,

Plaintiff-Appellee,

versus

THE REPUBLIC OF THE PHILIPPINES AND THE PHILIPPINES PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT,

Defendants-Appellants.

Appeal from the United States
District Court for the
Northern District of Texas

(3:90-CV-2785-R)

Before POLITZ, Chief Judge, JONES and PARKER, Circuit Judges. PER CURIAM:

This matter is before the court on appeal by The Republic of the Philippines and The Philippines Presidential Commission on Good Government of an adverse judgment following a bench trial. Having considered

the briefs and oral arguments of counsel and pertinent parts of the record, and finding neither error nor abuse of discretion, the judgment appealed is AFFIRMED.

APPENDIX B

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE UNITED STATES DISTRICT COURT IN THIS CASE, THE HONORABLE JERRY BUCHMEYER, UNITED STATES DISTRICT COURT JUDGE.

THE COURT: ... These will be the Findings of Fact and Conclusions of Law. They will be rough but I think they will be sufficient to tell the parties and the Fifth Circuit the basis for the conclusions on both the findings and the legal conclusions.

A, summary of the judgment, I am going to enter judgment in favor of the Plaintiff against both of the Defendants and judgment will be for these items: One, the market value of the plane in late 1989 or '90 and that value figure which I'll explain later is $9,750,000. Second is attorney fees, and I would grant the amount requested by the plaintiff as I'll explain later, that's

$1,214,853. That is through the end of September of 1983, and I'm going to ask the attorneys to do some additional work and another filing on attorneys' fees through today.

MR. LOWENBERG: Excuse me. The Court said 1983.

THE COURT: I'm sorry, '93.

Third is the expenses. And that would be through the end of September, 1993. That's $107,451.

And then fourth, as to punitive damages, this is an alternative finding because I don't think punitive damages are appropriate. However, if I'm wrong, well, then, and they are appropriate, I would grant the request for punitive damages. And that would be punitive damages in the amount of $4,800,000.

B is the background of the litigation. And one reason I'm doing oral Findings of

Fact and Conclusions of Law is the plethora of writing that has taken place in the case, including the Fifth Circuit's decision in the previous interlocutory appeal. That's Walter Fuller Aircraft vs. Republic of the Philippines, 965 F.2d 1375, July, 1992; also Faysound vs. Walter Fuller Aircraft, 748 F.Supp. 1365, Eastern District of Arkansas, 1990; and then the three opinions which this Court has issued. The dates are March 11, 1993, July 8, 1991, April 17, 1991. Then I also include in the writing in this case the opinion of the supreme court of the Philippines, and that was Plaintiff's Exhibit 121, and that opinion was December 26, 1990.

C, are credibility factors, and these choices are based upon the same factors that I tell juries to apply in judging credibility of witnesses. That's the manner in which the witness testified, whether the

witness had an interest in the outcome of this case, whether the witness' testimony was inconsistent or consistent with other credible evidence, the degree to which the witness was impeached.

Based upon those general factors, I do credit the testimony of Mr. Walter Fuller. I thought his testimony was very credible, very convincing. I credit Mr. Wilke, Harley Wilke's testimony. I could only review a deposition, but I credit that because it is inconsistent with the testimony that Mr. Fuller gave and that adds to the weight to be given Mr. Wilke's deposition.

I do discredit two witnesses who appeared for the Defendant. I credit ununfortunately [sic] -- I discredit unfortunately Mr. Daguna, who is an attorney, and I simply find that Mr. Sanchez was not credible on certain points. Candidly, as to Mr. Daguna, I have no doubt

that he lied under oath. He appeared to testify against a client that he had represented and I think that was unethical. He also -- if I accepted his testimony, what he would have done to this client would I think, also be unethical. That is, he represented a previous client, created a lien of 1.7 million on -- actually did the paperwork on it, 1.7 million dollars, then guided the Plaintiff through the paperwork in this transaction and, according to unbelievable testimony, instruction he gave to an agreement he participated in doing. He would have taken a position contrary to Mr. Fuller's interest in this case. That is, he would have left Mr. Fuller without recourse as to the full amount of money that he was investing in the project.

As to -- and some of the questions that I asked Mr. Daguna would indicate to the Fifth Circuit why I thought his testimony

was inconsistent.

I credit the testimony of Mr. Lombos. I did view the videotape deposition and I did find that he was a very credible witness with regard to explaining the government of the Philippines, the connections between the Republic of the Philippines and the Presidential Commission on Good Government.

As to the experts, I do not discredit any testimony by any of the experts completely. I did think that Mr. Smith was the most credible expert witness but I thought Mr. Markel was credible. Mr. Mulle, with a couple of exceptions, I thought he was credible. I also find support for the opinions that Mr. Markel and Mr. Smith in Mr. Fuller's testimony and Mr. Wilke's testimony. I don't consider that expert testimony because it wasn't offered as such. It's simply fact statements they gave, does support the Markel and Smith approaches.

And finally as to attorneys' fees, I do credit the testimony of Mr. Lowenberg, specifically credit his testimony concerning the work that was done in the case and the fact that the fees that were charged, both by his firm and by the other firms that were involved, were fair and reasonable fees.

And then with respect to any of the other witnesses who testified, I would credit their testimony only to the extent that it's consistent with the Findings of Fact that I'm going to make.

D, Findings of Fact:

1. The Plaintiff is a Texas corporation with its principal place of business in Dallas. The defendant republic of the Philippines and the Presidential Commission on Good Government are foreign states within the meaning of 28 U.S.C. Section 1602 through 1602, and 1609 through 1622. The Defendant Good Government

Commission is an agency or instrumentality of a foreign state under Section 1608.

2. In 1986, shortly after President Aquino became head of the new Philippine republic, she signed Executive Orders 1, 2 and 14 creating the Good Government Commission for the express purpose of assisting the president in recovering the illegally acquired assets and wealth of former President Marcos as well as his family and associates.

3. On March 25, 1986, President Aquino issued proclamation No. 3 which promulgated the provisional constitution of the Republic of the Philippines. Under Article II, Section 1D, the president was to give priority to recovering the ill-gotten properties amassed by Marcos and his supporters. This provision provides the constitutional basis for the sequestration of the Falcon 50 which is the subject of

this lawsuit. This became part of the constitution of the republic of the Philippines which was subsequently adopted in 1987.

4. Under proclamation No. 3 and the Philippine constitution and the comprehensive agarian [sic] reform laws of 1988, all recovery by the Good Government Commission are for the use and benefit of the agarian reform program which was an integral part of the government of the Republic of the Philippines.

5. On June 19, 1986, the Good Government Commission issued a writ of sequestration against the properties of Eduardo Cojuangco, one of Marcos' henchmen, including the 1982 jet involved in this case, that's the Falcon 50 aircraft, a lawsuit which was styled Republic of the Philippines vs. Conjuangco [sic] and others, Case No. 0033 in the Sandiganbayan, the

republic's antigraft court, that lawsuit being to recover the property subject to the sequestration orders.

6. In February of 1989 the Good Government Commission decided that the Falcon 50, which was sequestered at the Vilamor Airbase, should be sold. One supposed prospective purchaser was Art Condes or International Enterprises which supposedly had performed certain work on the Falcon. Although Condes did not purchase the plane, the Good Government Commission requested that Condes have a lien on the aircraft for the work that he supposedly performed. And so in its resolution of April 25, 1989, the Good Government Commission specifically made it a condition of public bidding for the Falcon that, quote, prospective bidders must submit an undertaking to reimburse Mr. Art Condes for the 1.7 million dollars for his expenses in

reconditioning the subject aircraft, closed quote.

7. The Good Government Commission then obtained a legal opinion from the -- that public bidding was not required for the sale of the Falcon. Accordingly, the republic, as Plaintiff in case No. 0033, sought the approval of the Sandiganbayan, the antigraft trial court, for the sale of the Falcon. However, on April 26, 1989, the republic requested to withdraw its motion for approval of the sale.

8. On May 12, 1989, the Good Government Commission's legal department issued an opinion saying that the commission had authority to dispose of the Falcon without prior Court approval.

9. On May 18, 1989, after learning of this legal opinion, the Sandiganbayan denied the republic's motion to withdraw its earlier motion for permission to sell the

Falcon. This May 18 resolution expressly refers to the republic as the intended seller of the aircraft and states that the Plaintiff republic is, quote, speaking through, closed quote, the Philippine solicitor general and is making this motion through the Good Government Commission. This opinion also expressed concern that the claim or suit against the Philippine government here or abroad causes the government even greater material or monetary damage; that is, it would cause that damage in the event the republic acted contrary to Philippine law.

10. On June 6, 1989, upon application by the republic, the Philippine supreme court issued a temporary Restraining Order enjoining the Sandiganbayan from enforcing the May 18 resolution. However, nine days later on June 15, 1989, a letter on the letterhead, quote, Office of the President

slash Presidential Commission on Good Government, closed quote, was sent to the United States State Department at the U.S. Embassy in Manila and to the Federal Aviation Administration in the United States. This letter informed the State Department and the U.S. Embassy that the Good Government Commission had exclusive authority to sequester and sell ill-gotten wealth of Marcos, and that the commission was giving this information in order to dismiss any adverse speculation about he authority of the commission to sell the property, including the Falcon 50.

11. On July 5, 1989 an affidavit of lien stating that a lien for 1.7 million on the Falcon was filed on behalf of Mr. Condes with the Philippine Air Transport Office. This affidavit of lien was prepared and filed by attorney Daguna who represented the Condes interest in that transaction.

12. Later in the summer of 1989, Mr. Walter Fuller heard about the opportunity to purchase sequestered airplanes in the Philippines. In late August or early September, Mr. Harley Wilke traveled to the Philippines on behalf of Mr. Fuller. Wilke was there for more than five weeks. During hat time he met with various representatives of the republic, including at least two members of the Good Government Commission and two different Philippine Commission on Audit representatives. Neither the good Government representatives or the Audit representatives ever disclosed to Mr. Wilke that there had been an intragovernmental controversy as to the power to approve the sale of the Falcon 50 jet or any other property that had been sequestered by the Good Government Commission. Mr. Daguna was hired by Mr. Wilke to represent Mr. Fuller and his interests. Attorney Daguna did not

disclose to Mr. Wilke that there had been such a controversy in the government either, nor did he disclose the fact that he had represented one of the parties who had filed the affidavit of lien on July 5, 1989.

13. Wilke began negotiations to purchase the Falcon 50 involved in this case. His initial asking price was -- offering was 7,200,000. On September 20, 1989, the Good Government Commission agreed to sell the Falcon to the Plaintiff for $5,025,000, quote, subject to the same conditions previously imposed by the commission, including the undertaking to directly settle with International Enterprises slash Art Condes in satisfaction of the lien of the latter on the said aircraft, closed quote.

The Court credits the testimony of Mr. Wilke and of Mr. Fuller that they reused to take on any such obligation. Indeed, they

both credibly testified that they wanted the aircraft free and clear with no line.

14. On September 22, 1989, an affidavit of withdrawal of the 1.7 million dollar lien of Art Condes was filed. After Mr. Wilke received a copy of the withdrawal, he then accepted the award of the Falcon by the Good Government Commission to Fuller and Fuller made the $50,000 nonrefundable cash deposit for the plane.

Again, based upon the testimony of Mr. Wilke and upon Mr. Fuller, the court specifically finds that neither had any knowledge of the title problem with the plane, neither had any knowledge of any dispute between governmental bodies or agencies in the Philippines, and that they did not discuss with each other the fact that there were any such problems because they didn't know of them.

And as indicated earlier, I'll also

credit Mr. Wilke's testimony that he refused to accept responsibility for settling the Condes lien because that was not acceptable to Mr. Fuller or himself, and that they demanded a good, clean, clear title, in the words of Mr. Wilke. I also credit Mr. Wilke's testimony that Commissioner De Leon of the Good Government Commission agreed that they would, in fact, give a good, clean bill of sale and warranty on the plane.

15. Mr. Fuller did make a $50,000 nonrefundable cash deposit for the purchase of the plane and received an official receipt of the Republic of the Philippines for that 50,000 deposit.

The Falcon had approximately 740 flight hours on it. That was an extremely low amount of time for a 1982 aircraft as this was. The Falcon was also valuable was [sic] because it was capable of international flights with three engines which complied

with rules and regulations of oceanic travel. In addition, in 1989 there were a limited number of previously owned Falcon Jets on the market nationwide. Although this point is disputed, the Court finds that the Falcon was, in fact, in good condition. It had low hours and it was a desirable aircraft.

There's also a dispute in the testimony, although not as great as the experts would seem to think, about the value of the plane. According to the bluebook publication widely used by aircraft sellers and purchasers, the fair market value of a similar plane with average hours at the time of the Fuller purchase of the Falcon 50 was $9,900,000. Again, the testimony of the experts was conflicting and I have estimates of the value of the plane ranging from 8.2 million 11,000,000 [sic] or more.

The three main opinions were by Mr.

Markel, Mr. Smith, and Mr. Mulle. The Court really concludes that Mr. Markel's estimate was too high, that Mr. Mulle's evidence was too low, and that Mr. Smith's testimony, which was in between those and which had a plus or minus factor of 2 percent, was the more credible testimony. Therefore, the Court credit's Mr. Smith's opinion that the -- that the market value of the plane at the time in question was $9,750,000. Again, he gave a plus or minus 2 percent variation. And the Court would adopt the basic figure that he gave.

As I indicated, the -- with certain adjustments in Mr. Mulle's testimony, his estimate was not that different from Mr. Markel or Mr. Smith. And I do agree with the arguments made by the Plaintiff that one would have to adjust Mr. Mulle's estimate by the cost of the engine overhaul done by the Garrett aviation repairs, and that's over

420,000; also, the ferry costs from Garrett to Little Rock which was over a hundred thousand; and then there were some additional expenses that would get those closer.

Then on other opinions in the case, they support generally the conclusion -- the finding that I've reached on value. Mr. Fuller's opinion was higher than Mr. Wilke's opinion. Mr. Fuller thinks the market value was 10 and a half to 11,000,000, that after they did the refurbish job of 300 to 400,000, the airplane could have been sold for $12,000,000.

Mr. Wilke's approach was that if a quick rehab was done for $600,000, then the airplane would have nine and a half to $10,000,000 value. Mr. Wilke's figure obviously is closer to Mr. Smith's opinion which I've adopted.

There were also conflicting testimony

concerning the condition of the plane, whether there was corrosion or not. And the Court, as I've indicated, would find that Mr. Fuller's testimony based on his two-day examination of the aircraft in Little Rock, Mr. Wilke's two-week examination at least of the plane in the Philippine [sic], show that the plane was in good condition and with anywhere from 250 to $300,000 or more it could have been sold for an even greater amount than the market value figure that I've found.

16. On September 28, 1989, the deed of sale was signed. That's Plaintiff's Exhibit 2. The deed of sale contains the defense and hold-harmless agreement in paragraph V(b). On that same day, September 28, 1989, the bill of sale was executed and it was signed. It states that the Presidential Commission on Good Government slash Republic of the Philippines sells, grants and

transfers all right, title and interest in the aircraft.

17. On October 2, 1989, the sequestration order on the plane was lifted by the Good Government Commission and the Air Transport Office of the Philippines gave its permission for the Falcon the [sic] leave the airbase. The Falcon was flown by pilots hired by Mr. Fuller and left the Philippines, eventually reached Little Rock.

18. On October 4, 1989, payment of the balance due, 4,975,000, was deposited in the Philippine National Bank, official depository of the Republic of the Philippines. An additional $2,175,000 was paid to the brokers for the Condes lien and for commissions.

19. The Falcon was flown to Little Rock, Arkansas. It was inspected by Mr. Fuller for at least two days. Then it was attached by lawsuit filed by Faysound,

Limited. Approximately one year later, on October 29, 1990, the United States District Court in Little Rock declared that Faysound was the rightful owner of the Falcon, and that's the opinion in 748 F.Supp. 1365. At that time, the time of the judgment, the Falcon which had been stored at the Falcon Jet facility in Little Rock had the market value which I have found of 9,750,000.

20. Upon receiving notice of the Faysound suit in October of 1989, Mr. Fuller immediately requested assistance and indemnification under his contract with the Good Government Commission. He requested funds to pay legal expenses for the defense, but instead the Good Government Commission, by a letter dated October 16, 1989, refused Mr. Fuller's request. Included in the letter were statements like these: "Our warranty to hold the buyer free and harmless from any and all claims on the aircraft

simply means that this claim should be directed against the sale proceeds, and that we're not retaining a lawyer in the United States to defend any case in Arkansas Arkansas [sic] because the sales proceeds would be eaten up by expensive attorneys' fees and other litigation expenses in the United States. The Good Government Commission provided an affidavit from Commissioner De Leon which reaffirmed the validity of the Falcon sale to Fuller. Obviously forced Mr. Fuller to hire attorneys to defend the title of the plane in the Faysound litigation.

21. On November 21, 1990, Fuller's attorney demanded -- made demand on the Good Government Commission for reimbursement of fees and expenses. There was no response to that demand. And then on December 20, 1990, Mr. Fuller's attorney sent another letter regarding the need for assistance by the

Philippine ambassador and the Good Government Commission. And then there was also additional correspondence in which Mr. Fuller attempted to gain control over the Falcon aircraft and to get assistance from the Good Government Commission and other Philippine authorities.

22. The United States and the Republic of the Philippines are contracting states to the Convention on International Recognition on Rights of Aircraft dated June 19, 1918, in Geneva, the Geneva Convention, and the article that's relevant is Article I1A.

23. On December 26, 1990, the Philippine supreme court issued a decision declaring the sequestration and subsequent sale of the Falcon to be violation of the law of the Philippines. This decision does not invalidated [sic] or address the indemnification or warranties of title given to Fuller. That decision also held that the

Good Government Commission had no power to sell the Falcon, which is obvious, because the lease had run out almost two years prior to the date of that -- actually over two years before the date of that opinion. Mr. Fuller was not told by either Defendant of this ruling of the Supreme Court and he did not learn of that until after the appellees' brief was filed in the Eight Circuit and the appeal in the Faysound Arkansas litigation. Based upon Mr. Fuller's testimony, if he had been -- and also upon the testimony of Mr. Lowenberg, if notice had been given then, subsequent legal fees and expenses would not have been incurred. Not all, but at least part of them.

24. And this is a for-example. On January 25, 1991 Mr. Fuller filed a Chapter 11 petition in the Bankruptcy Court attempting to maintain possession of the Falcon airplane until something hopefully

could be settled with the Plaintiff in the Arkansas case.

25. The actions of the Defendant in failing to defend and hold Mr. Fuller harmless constitutes a breach of the indemnification agreement and the deed of sale. In addition, it was also a breach of the warranty of good title given to Fuller in the FAA aircraft bill of sale. And Mr. Fuller suffered damages as a result of each of these contract breaches.

26. In both the bill of sale and the FAA -- in both the deed of sale and the FAA bill of sale, there were material misrepresentations made to Mr. Fuller. Mr. Fuller did rely upon and was damaged by those misrepresentations. In the deed of sale the representation to defend and hold Fuller harmless against any adverse claims was made by the seller, but within a matter of days after Fuller made demand for that to

be honored, he was told by the Good Government commissioner, De Leon, that there was no intent to warrant title. In particular, the evidence and certainly the circumstantial evidence before the Court establishes that the Good Government Commission never intended to comply with their obligations under paragraph V(b) to defend and hold harmless the Plaintiff.

That's based on several things. Mr. Fuller made repeated attempts to try to get someone to talk to and was unsuccessful until he finally reached Mr. De Leon who immediately refused to do anything and denied any liability. The immediacy of the refusal without even getting any details of the Arkansas suit would indicate bad faith on the part of the Good Government Commission. Other facts do likewise. The plane was sold by the Good Government Commission two years after the lease had

expired. There is nothing in the record of any notice given to Faysound. There's speculation about whether Faysound knew or not but there's no evidence in the record. And then in addition, the Good Government Commission blatantly attempted to evade the orders of the court in the Philippines.

I add to that -- this paragraph, also which is relevant to punitive damages claim, that the comments that I made earlier regarding discrediting the testimony of one witness, Mr. Daguna, and I did that simply because he simply did not tell the truth. Specifically, the Court discounts his testimony entirely. That is in meetings with -- in meetings that they had where Mr. Wilke was present, Commissioner De Leon said something to the effect that if there was any damage out of the contract of sale the commission's liability was limited to 5.25 million and that Mr. Wilke agreed to this.

Also totally discount Mr. Daguna's testimony that Mr. Sanchez told Mr. Wilke that there was no clear title to the plane and the sale by the commission was only as a conservator. I've already commented on the unethical conduct that I think Mr. Daguna engaged in.

For those reasons summarized, if the case legally would support award of punitive damages, the Court would grant one.

27. Mr. Fuller promptly tendered its defense in the action in Arkansas, but his tender and enforcement of the indemnity agreement were rejected by the Good Government Commission.

28. Mr. Fuller did incur these expenses in connection with the purchase of the Falcon: A, commission and expenses of Mr. Wilke, $154,486.68; B, transportation and insurance cost, $78,351.50. However, the Court finds that those are not recoverable as items of damage because the

basis of the recovery is the market value of the plane when it was delivered in Arkansas and those expenses would have been incurred by the Plaintiff in any event.

29. The attorneys' fees -- what is the number of the attorney fee exhibit? You've got a summary.

MR. LOWENBERG: 43, Your Honor, the summary.

THE COURT: 23?

MR. LOWENBERG: 43.

THE COURT: 43?

MR. LOWENBERG: Yes, sir.

THE COURT: Exhibit 43 shows the attorneys' fees and expenses and it sets out each one of the firms involved, both in the Arkansas litigation, the bankruptcy proceeding, attempt to work through the State Department in Washington, this litigation, and the total of all of those, with the exception of this case, would be

$755,046.55. That's through the end of September.

And then 30. That same exhibit would document the -- the attorneys' fees and expenses by Mr. Fuller in this case through -- did I give the right number?

MR. LOWENBERG: I don't have the exhibit with me.

THE COURT: I'm sorry. That may be an incorrect number. If it's inconsistent with what I stated that this one will control that at least through August 31, 1993, the Akin Gump total was $486,258.98.

31. To get the correct total of work done by the other firms and Akin Gump in other litigation and the total that Akin Gump has in this litigation is shown on Exhibit 43. That is through the end of September of 1993, and the total fees are $1,214,853. Total expenses, $107,451.30, for a total of fees and expenses through

September -- end of September of $1,322,304.30.

32. The attorneys' fees were fair and reasonable. The expenses were necessarily incurred in the litigation. The Court understands but rejects the argument that the attorney for Mr. Fuller made a mistake in the Arkansas case and that at least a port ion of the Arkansas fee should be deducted. The reason that I made that is -- that decision is twofold. One, I credit Mr. Lowenberg's analysis that -- that was simply a wrong decision. But more importantly, and the second reason, is the fact that none of that would have happened if, when the letter from Mr. Fuller to the Good Government Commission said come defend this lawsuit as you're obligated to do, if the commission had, in fact, done that, then those expenses would have not been incurred. And then actually I've got one other reason for not

discounting it and that's that Mr. Fuller has not complained and he's paying the bill and -- and I don't want to benefit the Defendant in a lawsuit by a bill that Mr. Fuller is paying.

33. And at this point the findings concern the jurisdictional issue and the Foreign Sovereign Immunity Act. And I do credit the testimony of Mr. Lombos. Mr. Lombos is an attorney in the Philippines. He's practiced -- had some practice before the Commission on Good Government and his testimony was very convincing: Specifically, that the Good Government Commission is a part of the office of the president of the Republic of the Philippines and that under the executive order previously mentioned the Good Government Commission was created to carry out presidential responsibility under the constitution of the Philippines. That's the

'86 and '87 constitution. That the commission acts under the direct authority of the president, that recoveries obtained by the Good Government are for the sole benefit of the republic in its comprehensive agarian [sic] reform program. The commission -- the Good Government Commission's conduct is reviewed by the Philippine Commission on Audits. The Good Government Commission is represented by the solicitor general of the Philippines. Its decisions are subject to direct appeal of the Philippine -- to the president.

34. The Court does find specifically that the Republic of the Philippines has taken contrary positions in other litigation and it has asserted that it was the seller of the Falcon 50 involved in this case. Those representations are in the case No. 0033 filed in the Philippines. That's the Sandiganbayan court, but there are also

other pleadings filed in the United States that contain similar admissions. And those are in a case in the Southern District of Texas, that's Houston, that's Cause No. H-86-1184; case in the Central District of California, that's Cause No. 86-86-3859; and in the Southern District of New York, Case No. 86-2294. And pleadings in all of those are exhibits in this case.

35. The Good Government Commission acts for the republic and the republic acts through the Good Government Commission.

36. The Good Government Commission is part of the executive branch of the Philippine government. It is not a corporation, it has no board of directors, no shareholders, issues no stock. The commissioners and employees of the Good Government Commission are civil servants of the republic. The commissioners are appointed by the president and may be

removed by the president at any time with or without cause. In seizing and selling the Falcon 50 to the Plaintiff Fuller, the Republic of the Philippines acted through the Good Government Commission as well as through the solicitor general and the Commission on Audit.

37. What happened to the money also confirms these findings. And the -- the $50,000 cash deposit and the balance of the purchase price for the plane went to the government of the Philippines. It was initially deposited in the Philippine National Bank. And as -- as established by the evidence and really conceded in argument, money that went to the Good Government Commission was money that went to the government of the Philippines.

39. As previously held by this Court, the deed of sale and the FAA bill of sale do not limit the Plaintiff's remedy to return

of the purchase money. Also as previously held, the documents which Mr. Fuller seeks to enforce are not ambiguous, not contradictory, parol evidence is not admissible to vary the terms or to show any purported intent that various those terms.

40. In essence the Court simply finds that it is not credible that Mr. Fuller would pay over $7,000,000 with the express intention of buying an expensive plane without getting fully warranted title and limited his remedies in the event of a breach.

41. Because the Court simply finds that the Plaintiff is right in its first claim, that is, that the Good Government Commission is, in fact, the government of the Philippines and vice versa, no punitive damages could be awarded. However, if I'm wrong about that and if the Plaintiff loses that on appeal to the Fifth Circuit but

prevails on the alter ego argument, then an award of punitive damages would be proper against the Commission on Good Government. That's both pursuant 28 U.S.C. Section 1606 and Texas common law.

And as far as the amount of punitive damages, the court would find that punitive damages of $4,800,000 should be awarded to the Plaintiff. That's less than the -- than the Plaintiff requests. I think that would serve the purpose of punitive damages if indeed that award should be made. It translates into about half the market value of the plane and also translates into about four times the amount of the attorneys' fees that were incurred through the date of trial -- through the end of September.

Conclusions of Law. Without belaboring all of the Conclusions of law, I have reviewed in detail all the Conclusions of Law that the Plaintiff has submitted in

their proposed Findings of Fact and Conclusions of law, and each one of those conclusions of law is correct. I think there may be a couple in there that are really not necessary in view of the way the case was tried, but rather than lengthen these findings unnecessarily I would simply adopt those Conclusions of Law.

Now, on a couple of things on attorneys' fees, I would like for the Plaintiff to put together another exhibit which would be comparable to the one you've done and that would be the attorneys' fees for the trial. And then if you would make those available with backup material to Mr. Williams. And then why don't you talk about it. If you want to file a motion and let me just handle that additional stuff just on paper, we can do that or if you can reach agreement on what the documents show that's consistent with these findings, then the

judgment would include that amount also.

MR. LOWENBERG: That's the amount, Your Honor?

THE COURT: That's the amount. Simply the amount.

MR. LOWENBERG: Basically the arithmetic based on Court's findings.

THE COURT: Yes. And then on the Findings and Conclusions, these are the Court's findings and conclusions. If you want to take these and -- and polish them, that's fine, or if you want to submit additional findings besides these, if that's convenient, well, then, you can certainly do that, as Mr. Williams can do also.

And then I have also studied the -- the proposed Finding of Fact and Conclusions of Law submitted by the Defendants and I would deny all of those insofar as they're inconsistent with what I found.

MR. LOWENBERG: One technical question

on this, Your Honor. The question of prejudgment interest that was included among our conclusions.

THE COURT: I'm sorry.

MR. LOWENBERG: I thought that was an appropriate area and might also be appropriate to state that in the findings. I'm not --

THE COURT: It should have been. I made a note during arguments and I simply forgot it. I should have included a finding that interest -- that the proper date to calculate the running of interest would be October 11, and that is the date of the letter. And that interest under Texas law would begin running 180 days after the date of that letter. So that interest -- so that the judgment would bear interest at the statutory rate about April 9 or April 10 of 1990.

MR. LOWENBERG: That's the 10 percent

rate?

THE COURT: Yes.

MR. LOWENBERG: Okay.

THE COURT: And then if there is an appeal, why don't y'all try to reach an agreement on the amount of the supersedes [sic] bond.

And then finally, as I indicated to you earlier, if you will take custody of your respective exhibits in the case of an appeal. I have all of the exhibits on the exhibit table with the exception of a handful that I was using on the findings and conclusions. And I'll just leave them on the end of the table up here.

MR. LOWENBERG: Another procedural matter, if I may, Your Honor? Not to burden the court with additional motions. As I read -- a cursory reading of Section 1610 of Title 28, which is the FSIA, it says there's no attachment or execution, as I read, under

the judgment shall permitted [sic] until the Court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment. And I think that if I read that correctly, that probably supersedes Rules 58 and 59 of the 10-day rules, that the court would therefore need to state in reasonable time either by motion or in an order for the effective date of execution.

I have no particular position on what that reasonable date might be. Obviously the Federal Rules provided 10 days, and if I read this correctly, the Federal Rules don't control the period of time on that.

THE COURT: If you can reach an agreement on the time period, you know, we can handle it that way.

MR. WILLIAMS: That's one thing I was going to ask and that is that we be

permitted a reasonable time within which to see if I can put up a bond at all.

THE COURT: Yes.

MR. WILLIAMS: It seems like it might be a little more difficult for a country to put up bond than, say, a financial institution or somebody giving a second on his house.

MR. LOWENBERG: I assume that's why the FSIA has that provision in it.

THE COURT: Why don't you talk about that before you get out of town and then reach a -- at least a general date on when you'll get back to Mr. Lowenberg and try to handle that by agreement. If you can't, then either handle it by motion or, if it's easier, just send me a letter.

MR. LOWENBERG: Yes, sir. I just wanted to point that out that -- if I read that correctly, the 10-day -- it's not the 10-day rule under Rule 59 or whatever, it

would be whatever the Court sets.

THE COURT: And then finally, Mr. Lowenberg, if you will prepare a final judgment --

MR. LOWENBERG: Yes.

THE COURT -- consistent with the findings.

MR. LOWENBERG: Yes, sir, we will.

APPENDIX C

APPENDIX C

United States Constitution, Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

APPENDIX D

FAYSOUND LIMITED, Plaintiff,

v.

WALTER FULLER AIRCRAFT SALES, INC. and Falcon Jet Corporation, Defendants.

No. LR-C-89-834.

United States District Court, E.D. Arkansas, W.D.

748 F.S. 1365
Oct. 29, 1990

MEMORANDUM OPINION

HENRY WOODS, District Judge.

I. STATEMENT OF FACTS

Faysound Limited ("Faysound"), a Hong Kong corporation, purchased a Falcon aircraft, the subject of this lawsuit, from the manufacturer at a cost of over nine million dollars. The plane was then leased to a Philippine corporation, United Coconut Chemicals ("UNICHEM") for a period of five years on October 23, 1982. Paragraph 6.1 of the lease agreement reads as follows:

> The aircraft may be used anywhere in the world and for this purpose the LESSEE may register the aircraft under the pertinent laws of such country as may be selected by the LESSEE. It is understood and agreed that the LESSEE is authorized by the LESSOR to register the aircraft under Philippine Registry. For this purpose, the LESSOR, upon request of the LESSEE, or the LESSEE itself, may cause the cancellation of the registration of the aircraft under any foreign registry.

(PX MM). The plane was then registered with the Philippine Bureau of Air Transportation on November 2, 1982, for use in the Philippines. UNICHEM's status was noted by striking the word "owner" and inserting the word "operator" above it. (Id). The original certificate registered the Falcon as "Name of Operator: United Coconut

Chemical, Inc. (Lessee)." Id.

The back of the certificate had the following entry:

> Aircraft herein registered is subject to the Lease Agreement entered into by and between FAYSOUND, LTD., a corporation organized and existing in accordance with the laws of Hong Kong (Owner-Lessor) and UNITED COCONUT CHEMICALS, INC., a corporation organized with the laws of the Philippines with principal address, offices at UCPB Bldg., Makati, M.M. (Operator-Lessee). (Contract of Lease on file).

(PX LL). For the next five years, which comprised the entire term of the lease, UNICHEM renewed its registration of the Falcon. (PX NN, OO, PP and QQ). The same entries were made in Bureau registration records.

The former Philippine President, Ferdinand Marcos, fled the Philippines on February 25, 1986. His successor, Corazon Aquino, created the Philippine Presidential Commission on Good Government ("PCGG") and charged it with the task of recovering ill-gotten assets of former President Marcos and his close associates. On June 19, 1986, the PCGG issued a Writ of Sequestration against one Eduardo Cojuangco, Jr., describing several aircraft including the Falcon (PX SS). Cojuangco was a multimillionaire businessman with substantial interest in UNICHEM and undoubtedly a close friend and adviser to Marcos. The Writ of Sequestration did not name Faysound nor was it served upon its agent. (PX YY). The writ therefore created no legitimate basis under Philippine law for the PCGG to seize any asset of Faysound. (PX WW at pp. 9-13). After the plane was sequestered, UNICHEM

renewed the registration with the Philippine Civil Aircraft Registry for the last year of the lease on October 30, 1986. (PX QQ).

On July 31, 1987, the PCGG instituted action against Eduardo Cojuangco, Jr. to recover his ill-gotten wealth. The complaint was filed in the Sandiganbayan Court, the special Philippine court established to adjudicate cases brought by the PCGG to recover ill-gotten assets, and assigned Civil Case No. 033. The complaint did not name Faysound nor any of the lessees of the Falcon. (PX YY, 9). The Falcon remained in the PCGG custody, but there was no further action (PX WW). Faysound instituted demands on its lessees for redelivery of the Falcon. (PX KK). On August 2, 1988, the authority of the PCGG to issue sequestration orders lapsed, and under Philippine law any prior sequestration order upon which no judicial action was filed

before August 2, 1987 was "deemed automatically lifted." Because no action was filed against the lessee or owner of the Falcon, as a matter of Philippine law, the writ of sequestration was deemed lifted on August 2, 1987.

The Falcon sat at the Villamo Air Base in the Philippines and began to deteriorate. The PCGG began efforts to sell the plane. It is not necessary to go into the efforts to sell the plane. Several prospects emerged, and efforts finally culminated in a sale to the defendant Walter Fuller Aircraft Sales, Inc. ("Fuller"). It is not necessary to a decision on the summary judgment issue to examine all of these negotiations. Suffice it to say that there is a strong aroma of corruption and bribery in connection with the sales efforts of PCGG.

The PCGG ultimately determined that it would be necessary to obtain the

Sandiganbayan Court's approval of the sale of the Falcon (PX WW). As that court noted in its opinion:

> [I]t appeared that the Solicitor representing the plaintiff did not know too many details about the relationship of the aircraft and the United Coconut Chemicals, Inc. (UNICHEM).
>
> It appears that UNICHEM is not a sequestered company but rather a company where only the shareholdings of defendant Eduardo Cojuangco, Jr. have been sequestered. ... It likewise appears that UNICHEM had not been furnished with a copy of the instant Motion and that it had not been intended to be so furnished (the notices were addressed only to defendant Cojuangco's lawyers of record). The consideration of said motion was, therefore, deferred.

Id at 2.

After the Sandiganbayan Court deferred consideration of the PCGG's first Motion to sell the Falcon, the PCGG filed a motion for early Resolution of its Motion to Sell on April 5, 1989. Id. This Motion was set for hearing on April 14, 1989. Id at 3. The PCGG argued that the Sandiganbayan Court did not need to resolve issues concerning the validity of the sequestration or questions concerning whether Cojuangco, the named defendant in the sequestration case, even owned the Falcon. Id. The Sandiganbayan Court rejected the PCGG's argument:

> The Court is unable to respond positively to plaintiff's position. Unquestionably, neither the issue of the ownership of the aircraft nor the propriety of the sequestration thereof has been raised in the pleadings before the Court with regard to the motion to

sell the aircraft in question. Invocation, however, of the power of the court to authorize the deposition of a sequestered asset or a seized property (the sequestration or seizure of which was not upon this Court's authority) must necessarily, though perhaps implicitly, include a plea for the affirmance of the propriety of that seizure. And were there no reason for this Court to doubt the original seizure, then this Court would, as it must, accord the PCGG the rebuttable presumption of regularity in its act. The plaintiff-movant through the PCGG itself, however, has presented this Court with the facts which serve to dilute the presumption of regularity which this Court would accord the PCGG's own acts, namely:

(1) The aircraft in question is

apparently NOT owned by UNICHEM;

(2) It is apparently NOT owned by defendant Cojuangco either but, upon plaintiff's own admission, by "Faysound." Certainly no averment has been made either by PCGG or anybody else to prove false the data on the Certificate of Registration of that aircraft to that effect;

(3) UNICHEM itself is not a sequestered corporation (only the shares of stock therein owned by defendant Cojuangco appear to have been sequestered);

(4) The lease over the aircraft, according to the plaintiff itself, lapsed (in 1987) more than two years ago;

(5) The renewal of the Certificate of Registration issued by the Bureau of Air Transportation on October 30, 1986,

four months AFTER this and other aircraft had been ordered sequestered per writ of sequestration on file with this Court.

There is, then, every indication on the very face of the pleadings of plaintiff-movant and the allegations in open Court that the sequestration of the aircraft now sought to be sold was not in order. It is true that no one, not even the lessor has come to Court nor, as far as this Court is properly informed, has anyone sought to question the propriety of the plaintiff's (or PCGG's) seizure thereof anywhere else. This silence from others who may be parties to interest to this aircraft, however, does not justify authorization of the projected sale of that aircraft when it becomes apparent that the premises for such an authorization do

not exist--in this instance, a valid sequestration.

Id at pp. 3-5 (footnote omitted).

The PCGG, through the Solicitor General, had argued the Court need not concern itself with who owned the Falcon because that could be resolved later. The Court was unimpressed:

> It will not do to say that the issue of ownership can be taken up later when the case proceeds to trial since one of the issues, even now, remains the prima facie propriety of PCGG's seizure thereof which PCGG now makes abundantly apparent to have been absent.

Id at 5.

After the hearing on the PCGG's Motion for Early Resolution on March 14, 1989, the PCGG reversed its earlier position that it required Sandiganbayan Court approval to sell the Falcon. Id at 7. The

Sandiganbayan Court attributed this about-face to the fact that the PCGG knew Court approval of the proposed sale was unlikely:

> The Motion to Sell the aircraft was heard on April 14, 1989 where very pointed questions were asked by the Court about the propriety of the sequestration of the aircraft in question and the resulting propriety of selling the same. Until that date the PCGG acknowledged its need for court authority before selling this aircraft.

Id.

Accordingly, on April 27, 1989, the Philippine Solicitor General filed a Motion to Withdraw the PCGG's earlier request for authority to sell the Falcon at the request of PCGG Commission DeLeon. Id. The Sandiganbayan Court initially viewed the Motion to Withdraw as a decision by the PCGG not to sell the Falcon. Id. The

Sandiganbayan Court stated:

> The Motion to Withdraw can and could only be viewed as a desistance by the PCGG from the original plan for the sale of the aircraft. Rather than issue a resolution pointing out the breach by the PCGG of the basic precepts of fairness, justice and due process, the Court acceded to the withdrawal of the motion and deemed the matter of the proposed sale moot and academic.

Id. But DeLeon and his fellow commissioners at the PCGG had not in fact abandoned the sale; instead, the PCGG publicly acknowledged that it intended to sell the Falcon "sans court consent." Id. In addition, according to the Sandiganbayan Court's opinion, Tony Daguna, the lawyer for International Enterprises, Inc., learned of the Sandiganbayan Court's accession to the

motion to withdraw "even before the process servers of the Court had served the resolutions granting the withdrawal." Id. at 8.

This inside knowledge and the PCGG's about-face greatly disturbed the Sandiganbayan Court. In the words of the justices of the Sandiganbayan Court, "[t]he withdrawal turned out to be a ploy for a scheme to proceed with the sale without the obstruction of unexpected negative [Sandiganbayan Court] order." Id. at 7. With regard to Daguna's apparent inside information, the Sandiganbayan court stated that it "views with concern the alacrity with which the prospective buyer of that aircraft sought a copy of this court's resolution almost simultaneously with the announcement of the cynical maneuver by which the PCGG intended to do away with Court authority for the disposition of

property in custodia legis--which is what sequestered property is." Id. at 9.

Obviously appalled by the PCGG's scheme, the Sandiganbayan Court recalled its resolution permitting the PCGG to withdraw its Motion to Sell. Id. Once this resolution was recalled, the Sandiganbayan Court ruled on the merits of PCGG's Motion for Authority to Sell the Falcon and denied it in scathing language:

> For this Court to allow the sale of the property belonging to a stranger to the suit (the lessor) to take place more than two years after the lease thereof had expired (and when return, therefore, should have been made to the owner/lessor), and for that sale to be justified only by the fact that this very valuable piece of property (U.S. $10 million) has rapidly deteriorated for having been unattended to by the

very sequester itself, as the sequester PCGG has said, is neither just nor legal.

What is worse is that plaintiff has acted before this Court without any care or effort to show that these facts and events notwithstanding, the sequestration was at least apparently appropriate. The PCGG, in the words of the Supreme Court, is not above the law ... and it is bound to justify its continued exercise of powers in the face of its own contradicting evidence. ...

For all of these reasons, plaintiff cannot ask this Court to sanctify its acts as sequester while, in the face of its own debilitating evidence, it remains unwilling to explain why a stranger's property has been sequestered.

Id. at 10, 12 (citation omitted).

Finally, the Court criticized the basis asserted by the PCGG as an excuse to sell the Falcon:

> Plaintiff urges authority to sell because the airplane is allegedly deteriorating rapidly, the airplane by the plaintiff's own admission having been unattended to since sequestration. Care of sequestered property is the sequester's primary responsibility. Plaintiff's failure at that duty cannot justify the sale of property which, to all appearance, belongs to a stranger and should not have been seized in the first place.

Id. at 13 (emphasis supplied).

The Motion to Sell was denied "since in the very first instance, no justification prima facie or otherwise has been demonstrated for its seizure from its

lessee." Id.

When the Sandiganbayan Court issued this scathing opinion on May 18, 1989, the PCGG sought immediately to avoid this public rebuke and also to avoid the Sandiganbayan Court's injunction "to report to the court the status of the projected sale of the aircraft and its present location" within ten days of the Order. (Condes Dep., Response Ex. T at 6, 12-13). An Assistant Solicitor General for the Philippines agreed on behalf of the Solicitor General to help the PCGG avoid the Sandiganbayan Court's Order in return for a "token" from the proceeds of the sale. (Condes Dep., Response Ex. T at 6, 12-13).

Thereafter, on June 6, the PCGG filed a petition for certiorari with the Supreme Court of the Philippines requesting (a) a temporary restraining order from enforcement of the Resolution of the Sandiganbayan

Court, and (b) ultimately a ruling that the Resolution is void as undue interference with the administrative/executive functions of the PCGG (Response Ex. X-1). The PCGG did not seek a ruling that the sequestration was valid or a ruling as to the lawful owner of the Falcon, asserting instead that the sale of the Falcon will not "prejudice the rightful owners as may be finally declared by the respondent Sandiganbayan." Id. at 26. On the same day the Petition was filed, the Supreme Court "Resolved, without giving due course to the petition, to require the respondent to COMMENT" on the petition and in the interim issued a temporary restraining order ordering the Sandiganbayan Court to desist from enforcing the Resolution pending further order of the Court. (Response Ex Y (emphasis supplied). That is, the Supreme Court did not even consider whether it would grant certiorari

and hear an appeal, the effect of its ruling is that only the reporting requirement of the Resolution was temporarily stayed. (Antonio Aff., Response Ex. U at 18-19).

Commissioner DeLeon, whose activities in connection with the sale of the aircraft are highly suspicious, seized upon the action of the Supreme Court, which were actually not significant, as granting authority for the PCGG to sell the plane. The Supreme Court has never granted such authority nor has it granted any review of the decision of the Sandiganbayan Court. On September 21, 1989, the PCGG accepted Fuller's bid subject to settling with Condes to satisfy the "Condes lien." Condes was a major factor in the negotiations between the putative purchaser and the PCGG. This lien in the amount of 1.7 million dollars appears to be a cover for bribes paid to various Philippine officials. Slightly over five

million dollars went to the PCGG.

The PCGG gave a bill of sale to Fuller. The plane was flown out to be reconditioned at Falcon Jet's maintenance plant at Little Rock, Arkansas, where it is now located.

II. DISCUSSION

A. The Treaty Exception of the "Act of State" Doctrine

Both parties have moved for summary judgment. Summary judgment is granted in favor of the plaintiff Faysound and denied as to defendant Walter Fuller Aircraft Sales, Inc. Defendant seeks to defend a clear expropriation of plaintiff's property o the ground of the "act of state" doctrine. This doctrine was articulated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), where the Castro government in Cuba expropriated a shipment of sugar sold under a futures contract while the sugar was being loaded on

a ship in Cuba. The Supreme Court held:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 427-28, 84 S.Ct. at 940.

[1] This case comes clearly within the exception noted, supra. Both the United States and the Philippines are signatories to the Geneva Convention, which covers property rights in aircraft along with other aviation subjects. While the Sabbatino Court was not anxious to enter the conflict of ideologies involved in the Cuba expropriation, it acknowledged that most

principles of international law are not so difficult:

> There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

376 U.S. at 430, p. 34, 84 S.Ct. at 941, p. 34. The Geneva Convention represents an area of broad international consensus. The Treaty in Article I provides as follows:

> (1) The Contracting States undertake to recognize:
>
> (a) rights of property in aircraft;
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> (b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

(c) rights to possession of aircraft under leases of six months or more;

(d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

(i) have been constituted in accordance with the laws of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting

States shall not admit or recognize any right as taking priority over the rights mentioned in paragraph (1) of the Article.

The case at bar is clearly within the exception noted in Sabbatino. The expropriation in that case was not proscribed by a treaty couched in clear and unambiguous terms. congress almost immediately enacted legislation to overrule the decision. The Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) was "enacted to make sure that the United States not become a 'thieves market' for the product of foreign expropriation." 110 Cong.Rec. 19,557, 88th Cong. 2d Sess. (1964):

> The amendment is designed to discourage uncompensated expropriation of foreign investment by preserving the right of the original owners to attack any

> taking in violation of international law if the property involved comes before a U.S. court. Because the United States is the largest market for the products of many U.S. owned companies in foreign countries, the knowledge that this market will be denied to stolen property should discourage seizure of that investment.

Id.

On remand of the Sabbatino case from the Supreme Court of the United States, the District Court and the Court of Appeals for the Second Circuit held that the Hickenlooper Amendment compelled a different result and had in effect vitiated the Sabbatino decision. Banco Nacional de Cuba v. Farr, 243 F.Supp. 957 and 272 F.Supp. 836 (S.D.N.Y.1965), aff'd 383 F.2d 166 (2d Cir. 1967), cert. denied 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968). Any remaining

efficacy of the Sabbatino case has been further weakened by the decisions of the Supreme Court in First Nacional City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); and W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., ___ U.S. ___, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990).

Fuller argues that the Hickenlooper Amendment applies only if the property of a United States citizen is involved and only when the expropriated property or its proceeds were in the United States when the expropriation occurred. For its claim that the Amendment does not apply to aliens, Fuller aircraft cites the First Hickenlooper Amendment, 22 U.S.C. §2370(e)(1), rather than the Second Hickenlooper Amendment. Unlike the Second Hickenlooper Amendment,

the First Hickenlooper Amendment by its terms refers only to United States citizens. The Second Hickenlooper Amendment contains no such limitation. Indeed, the Reporters for the Restatement of the Foreign Relations Law of the United States disagree with Fuller Aircraft's contention, "The Amendment, if otherwise applicable, would apparently apply to a claim by an alien as well as by a national of the United States...." Rest. 3rd, Restatement of the Foreign Relations Law of the United States, § 444, Reporter's Note 6.

Fuller Aircraft is similarly misguided in arguing that the Second Hickenlooper Amendment does not apply because the Falcon was not in the United States when the expropriation occurred. Comment e to § 444 of the Rest. 3rd, Restatement of the Foreign Relations Law of the United States provides:

e. Claim to specific property. The

> exception in the Act of State Doctrine embodied in the Second Hickenlooper Amendment has been held to be limited to actions asserting title to property before the court. Thus, if the plaintiff claims ownership of a vessel that has been taken by a foreign state and the vessel is at a port in the United States, the plaintiff may rely on the Amendment in asserting title before a court in the United States.... In order for the Hickenlooper Amendment to apply, the plaintiff must allege and prove that the property that is the subject of the claim is in the United States or was there at the time the action was commenced.

(Emphasis supplied).

As noted above, the Sabbatino case makes a clear exception where the expropriation is covered by a treaty. The

act of state doctrine "was never intended to apply when an applicable bilateral treaty governs the legal merits of the controversy." Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1540 (D.C.Cir. 1984). The provisions of the Treaty set out, supra, are clear and unambiguous. They provide governing legal standards for the Court's determination of the issues:

> Additionally, there is a great national interest to be served in this case, i.e., the recognition and execution of treaties that we enter into with foreign nations. Article VI of the Constitution provides that treaties made under the authority of the United States shall be the supreme law of the land. Accordingly, the Supreme Court has recognized that treaties, in certain circumstances, have the "force and effect of legislative enactment."

> See, e.g., Whitney v. Robertson, 124 U.S. 190 [8 S.Ct. 456, 31 L.Ed. 386] (1888). The failure of this Court to recognize a properly executed treaty would indeed be an egregious error because of the position that treaties occupy in our body of laws.

Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 428 (6th Cir. 1984).

B. Applicability of "Act of State Doctrine"

[2] Another serious question in this case is whether the acts of the PCGG were true "acts of state." Fuller must prove that PCGG exercised sovereign power in its sequestration and sale of the Falcon. We hold it did not exercise such power. Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 691, 96 S.Ct. at 1859.

The only evidence offered to show that

PCGG had authority to sell the plane in the exercise of Philippine sovereignty is an affidavit from Rosalio DeLeon, a PCGG Commission. DeLeon's motives and actions are highly suspect. He is the brother-in-law of Ben Cuevo, one of the Philippine "middle men" appointed as exclusive agent by Fuller.

Plaintiff has submitted the deposition testimony of Art Condes, one of the main players in the attempt to sell the Falcon, that DeLeon was to receive a bribe of $150,000. Plaintiff has also submitted an affidavit from a former Solicitor General and Supreme Court Justice, specifically controverting DeLeon's affidavit with regard to the PCGG's authority under a Writ of Sequestration:

> Assuming, however, that the falcon aircraft had been validly sequestered ... there can be hardly any doubt that

> the sequestration of the aircraft may be deemed to have been "automatically lifted" as of August 2, 1987.
>
> ....
>
> But even if it is assumed that the sequestration of June 19, 1986, on the Falcon aircraft continues to be effective, PCGG had no authority to sell the aircraft. The power to sell property pertains to the owner (Article 428 and 429, Civil Code). And the Supreme Court has ruled that sequestration does not vest in the PCGG the right of ownership.

(Antonio Affidavit, Response Ex. U at 11-12).

Assuming that the above conduct raises factual issues that are not appropriate for disposition by summary judgment, there are other factors that as a matter of law preclude Fuller reliance on the "act of

state" doctrine. To establish that sale of the plane was an act of state, Fuller relies on three executive orders of President Aquino which are summarized as follows. Executive Order No. 1 creates the PCGG for the purpose of recovering all ill-gotten wealth. It charges the PCGG with the task of assisting Aquino in (1) recovering all ill-gotten wealth accumulated by Marcos and his close associates; (2) investigating cases of graft and corruption assigned to it by the President; (3) sequestering or placing or causing to be placed under its control or possession any building or office wherein any ill-gotten wealth of properties may be found; (4) provisionally taking over in the public interest or to prevent its disposal or dissipation, business enterprises and properties of Marcos and his close associates.

Executive Order No. 2 addresses the

funds, money, assets, and properties illegally acquired or misappropriated by Marcos and his associates. This order (1) authorizes the freezing of all assets and properties in the Philippines in which Marcos or his associates have an interest or participation; (2) prohibits any person from transferring, conveying or otherwise depleting or concealing such assets; (3) requires all persons in the Philippines holding such assets to make such disclosure; and (4) authorizes the PCGG to request and appeal to foreign governments whether in any such assets for properties may be found to freeze them pending adjudication of ownership in the Philippine Court.

Executive Order No. 14 gives the Sandiganbayan Court original jurisdiction over cases involving the ill-gotten wealth of Marcos and his associates. No provision of these executive orders authorizes the

expropriation and sale of property belonging without question to a Hong Kong national.

The writ of sequestration that PCGG issued against Eduardo Cojuangco, Jr. surely cannot be the "act of state" on which Fuller relies. Cojuangco did not own the plane. A company in which he owned stock leased the plane. The lease had almost expired. The owners of the plane is not a party to the sequestration order. In any event sequestration by the PCGG vests no title in the latter, as the Philippine Supreme Court has aptly pointed out. It is a method of conserving the property pendente lite.

> [T]he act of sequestration, freezing or provisional takeover of property does not import or bring about a divestment of title over said property; does not make the PCGG the owner thereof. In relation to the property sequestered, frozen or provisionally taken over, the

> PCGG is a conservator, not an owner. Therefore, it cannot perform strict acts of ownership.

Baseco v. PCGG, 150 S.Ct.Rep.Ann. 81, 236 (Philippine S.Ct. 1987).

As a matter of fact, Fuller in his original brief identified the PCGG as a receiver. A court-supervised trustee does not exercise sovereign power under the "act of state" doctrine. See Remington Rand Corp. v. Business Systems, Inc., 830 F.2d 1260 (3rd Cir. 1987). The PCGG as a receiver must act under the authority of a court. By President Aquino's Executive Order No. 14, that court was the Sandiganbayan Court. That Court denied PCGG the authority to sell this plane and scathingly denounced its action in regard to the seizure and attempted sale of the plane, as was pointed out, supra, in the Statement of Facts. The order was never reversed or

vacated by the Supreme Court.

[3,4] To qualify as an act of state, it is necessary to prove that the act "occurred as a result of a considered policy determination by a government to give effect to its political and public interest--matters that would have significant impact on American foreign relations." Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1295 (3rd Cir.1979). The Court in Mannington Mills refused to grant "act of state" status to a foreign sovereign's grant of a patent. Similarly, a foreign judicial judgment in a case involving private litigants does not rise to the status of an act of state. Timberlane Lumber Co. v. Bank of American, 549 F.2d 597, 607-08 (9th Cir.1976). Nor does a party's initiation of foreign judicial proceedings amount to an act of state. Dominicus Americana Bohio v. Gulf & Western, 473 F.Supp. 680, 689

(S.D.N.Y. 1979). And as the Supreme Court stressed in Alfred Dunhill of London, supra, a foreign naval officer's operation of the foreign sovereign's ship on behalf of the sovereign does not give rise to an act of state. 425 U.S. at 693-94, 96 S.Ct. at 1860-61.

C. The Bribery Issue

This court is reluctant to rely on the rather obvious inference that the transaction was tainted with bribery and corruption. One significant aspect is that Fuller was required to discharge the so-called "Condes lien" before the sale could be completed. The amount of this lien was never disclosed but appears to have been in the neighborhood of two million dollars. It is a fair inference that the Condes lien was a device to cover up and launder bribes to various Philippine officials. Such factual proof os difficult when the site of the

transaction is in a foreign country. I do not find it necessary to decide the bribery issue as a further means of negating the "act of state" doctrine on which Fuller relies. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., ___ U.S. ___, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). There is ample basis for sustaining the plaintiff's motion for summary judgment on other grounds.

III. CONCLUSION

The PCGG expropriated an expensive airplane without any legal basis whatsoever. Although the plane was leased to a company in which an associate of Ferdinand Marcos was a stockholder, the Marcos associate owned no interest whatsoever in the plane, and the lease was near the end of its term. The plane was nevertheless seized and sold in a transaction having the strong odor of

corruption. The sale was made in the face of an adverse ruling by the Philippine court never having supervision over it--a ruling never reversed by the Philippine Supreme Court. The seizure and sale violated the specific terms of the Treaty known as the Geneva Convention covering property rights in aircraft. It violated principles of international law, the Second Hickenlooper Amendment, as well as principles of Philippine law enunciated by the Philippine court having jurisdiction over this matter.

APPENDIX E

corruption. The sale was made by the Chief of an adverse ruling by the Philippine court never having supervision over [illegible] never reversed by the Philippine Supreme Court. The seizure and sale violated the specific terms of the Treaty known as the Geneva Convention covering property rights in aircraft. It violated principles of international law, the Second Hickenlooper Amendment, as [illegible] of Philippine law established by the Philippine court having jurisdiction over this matter.

APPENDIX E

WALTER FULLER AIRCRAFT SALES, INC., Plaintiff-Appellee,

v.

The REPUBLIC OF THE PHILIPPINES and the Philippines Presidential Commission on Good Government, Defendants-Appellants.

No. 91-1805.

United States Court of Appeals, Fifth Circuit.

965 F.2d 1375

July 8, 1992.

KING, Circuit Judge:

Shortly after the Marcos regime was ousted from the Philippines, the new government of Corazon Aquino created the Presidential Commission on Good Government (PCGG) to recover any ill-gotten gains of Marcos and his confederates. using its power to sequester property, the PCGG obtained control of a Falcon 50 jet

aircraft (the Falcon) that had been leased by a Philippine corporation with alleged ties to the former Marcos regime. The owner of the plane was Faysound, Ltd., a Hong Kong corporation. The PCGG ultimately sold the Falcon to an American corporation, Walter Fuller Aircraft Sales, Inc. (Fuller), which brought it to the United States. Faysound, distressed about the disposition of its property, brought an action against Fuller in federal district court in Arkansas to try title, and won.

This lawsuit arose out of the Arkansas proceedings. Fuller, claiming that the PCGG had promised in the deed of sale to defend any action brought by an adverse claimant to the Falcon, sued the PCGG and the Republic of the Philippines (Republic) in the United States District Court for the Northern District of Texas in an effort to recover the cost of defending Faysound's

lawsuit. The PCGG and the Republic moved to dismiss on the ground that they were entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA),[1] but the district court held that the suit could go forward against both defendants. We agree that the district court had subject matter jurisdiction over the suit against the PCGG under the commercial activities exception to the FSIA, but the record is insufficient to allow a determination of whether the Republic can be held liable for the acts of the PCGG under an agency theory. We also reject the defendants' argument that the act of state doctrine bars the suit, and hold that the district court had jurisdiction over a tort claim advanced by Fuller. We do not,

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[1] Pub. L. 94-583, 90 Stat. 2891, codified at 28 U.S.C.§§ 1330; 1332(a)(2)-(4); 1391(F); 1441(d); 1602-1611.

however, accept the defendants' invitation to review the district court's ruling on the issue of forum non conveniens.

I.

On February 28, 1986, President Corazon Aquino signed Executive Order No. 1, creating the PCGG. The PCGG was charged with, inter alia, assisting in "[t]he recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them...." In order to carry out this duty, the PCGG was given the power and authority "[t]o provisionally take over in the public interest or to prevent its disposal or dissipation, business enterprises and properties taken

over by the government of the Marcos Administration or by entities or persons close to former President Marcos...." Two weeks later, by Executive Order No. 2, President Aquino froze and prohibited the transfer of all assets in which Marcos or any of this associates had any interest.

Using its power under Executive Orders Nos. 1 and 2, the PCGG issued a writ of sequestration against Eduardo Cojuangco, Jr., describing a Falcon 50 jet aircraft registered in the name of United Coconut Chemicals, Inc. (UNICHEM) as lessee. Cojuangco was a wealthy businessman with a substantial interest in UNICHEM, and had ties to former President Marcos, As required by Executive Order No. 14, the PCGG applied to the Sandiganbayan, the special Philippine court established to adjudicate claims to property sequestered by the PCGG, for permission to sell the

Falcon. The Falcon began to deteriorate while the proceedings were pending, so the PCGG stepped up its efforts to sell. In late summer 1989, Fuller, a Texas corporation in the business of aircraft brokerage and resale, began negotiations with the PCGG for the purchase of the Falcon. Although the PCGG apparently never received permission from the Sandiganbayan to sell the plane, it eventually closed the deal with Fuller.[2] Fuller and the PCGG executed two agreements covering the sale, a Deed of Sale and a Memorandum of Agreement. The Deed of Sale provides as

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[2]The events leading up to the PCGG's acquisition of authority to sell the aircraft, none of which is relevant to this appeal, are intriguing and are commended to intrepid students of international law and civil procedure. See Faysound, Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F.Supp. 1365, 1367-70 (E.D. Ark.1990), appeal dismissed, 940 F.2d 339 (8th Cir.1991) (per curiam), cert. denied, ___ U.S. ___, 112 S.Ct. 1175, 117 L.Ed.2d 420 (1992).

follows:

ARTICLE V. WARRANTIES AND REPRESENTATIONS

b. The SELLER ... does hereby assume full responsibility, to defend and hold harmless the BUYER from any and all claims of all persons whosoever, including but not limited to adverse claims, charges, liens, and/or possible encumbrances that may be place [sic] on the title by reason of any act, contract or agreement entered into, prior to the date of this Deed of Sale, as the SELLER by virtue of this sale, has released subject aircraft absolutely free from any such claims, for if any there be should arise, such claims are understood ipso facto directed against the proceeds of the sale that is deposited in escrow, and not anymore on the aircraft.

After taking possession, Fuller transported the Falcon to Arkansas for repairs.

On October 9, 1989, Faysound, the Hong Kong corporation that owned the Falcon and had leased it to UNICHEM, filed an action in the United States District Court for the Eastern District of Arkansas against Fuller and Falcon Jet Corporation to try title to the aircraft (the Arkansas action). Fuller notified the PCGG in writing of the Arkansas action and requested that it "defend and hold [Fuller] harmless" from Faysound's claim of title to the aircraft. The PCGG refused. On October 29, 1990, the district court granted Faysound's motion for summary judgment, holding that the PCGG's expropriation of the Falcon from an entity that did not own it was not protected by the act of state doctrine. Faysound, Ltd. v. Walter Fuller Aircraft

Sales, Inc., 748 F.Supp. 1365 (E.D.Ark.1990) appeal dismissed, 940 F.2d 339 (8th Cir.1991) (per curiam), cert. denied, ___ U.S. ___, 112 S.Ct. 1175, 117 L.Ed.2d 420 (1992). On November 21, 1990, Fuller again requested that the PCGG bear the costs of defending the Arkansas action. The PCGG again refused. On December 10, 1990, fuller filed this action against the PCGG and the Republic for breach of the contractual indemnity clause, for breach of warranty of title, and for a declaration of the parties' rights under the Deed of Sale.

The PCGG and the Republic filed a joint motion to dismiss. They agreed that they were both foreign states as defined in the FSIA, but the Republic argued that it could not be held liable for the actions of its instrumentality, the PCGG. Moreover, they asserted, none of the exceptions to the FSIA's general rule of sovereign

immunity, including the "commercial activities" exception, applied, so the district court lacked subject matter jurisdiction. Finally, they argued that the suit was barred by the act of state doctrine. In an order entered April 18, 1991, the district court denied the motion. It held, first, that under the analysis of First National City Bank v. Banco Para el Comercia Exterior de Cuba, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) [Bancec], the Republic could be sued for the acts of the PCGG because the PCGG was the "alter ego" of the Republic. It then held that the FSIA did not shield the defendants from liability because (1) the Deed of Sale, although not containing an explicit choice of law provision, contemplates that disputes would be adjudicated in the United States, and therefore functions as an implicit waiver

of sovereign immunity under 28 U.S.C. § 1605(a)(1) (exception for waiver of immunity); and (2) the contract between the PCGG and Fuller was commercial activity which produced a direct effect in the United States sufficient to support jurisdiction under 28 U.S.C. § 1605(a)(2) (exception for commercial activities). With respect to the commercial activities exception, the district court held that the PCGG had engaged in commercial activity because the aircraft contract was the type into which private parties enter. It also held that the contract amounted to commercial activity outside the United States with a "direct effect" in the United States, because the PCGG's alleged actions caused Fuller, an American corporation, to suffer a foreseeable financial loss. The court next determined that it had personal jurisdiction over the defendants. Finally,

the court determined that the act of state doctrine did not bar the suit because the sale of the Falcon either was not the act of a sovereign or involved repudiation of a commercial obligation.

In an amended complaint, Fuller added a claim for actual and punitive damages against the PCGG under a tort theory and alleged an exception to sovereign immunity under 28 U.S.C. § 1605(a)(5) (noncommercial tort exception). The defendants then filed a second motion to dismiss, adopting the arguments for dismissal asserted in their original motion and adding the additional defense of forum non conveniens.[3] In an

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[3]The amended complaint was filed before the district court's first order. The defendants had responded by filing their second motion to dismiss on April 12, six days before the first order was entered on the docket but two days after the order had been signed by Judge Buchmeyer. After the first order was issued, the defendants filed a notice of appeal. A panel of this court dismissed the appeal as premature because the district court had not yet

order entered July 9, 1991, the district court determined that it had jurisdiction over Fuller's tort claim through the operation of 28 U.S.C. § 1367 (providing for "supplemental" jurisdiction over related claims whenever district courts have original jurisdiction in a civil action) and denied the forum non conveniens argument. With respect to the latter, the court held that the Philippines would not be an adequate forum, that trial of the case would be easier in Texas, and that the public interests in the dispute weighed in favor of an American forum.

[1] The defendants filed a timely notice of appeal after the district court's second decision.[4] On October 31, 1991,

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ruled on the second motion to dismiss which contained the tort immunity claim.

[4]Immediate appeal, under the collateral order doctrine, is permitted from an order denying sovereign immunity under the FSIA. Stena Rederi AB v.

Fuller filed its appellate brief and a Motion to Dismiss Moot Appeal. In the motion, Fuller pointed out that the PCGG had recently filed a complaint in an adversary proceeding in the Bankruptcy Court of the Northern District of Texas against Faysound and Fuller. The bankruptcy complaint, which was attached to the motion, sought a declaration either that Fuller was the rightful owner of the Falcon, or, if Fuller was not the rightful owner, that the PCGG had an interest in the aircraft superior to that of Faysound.[5] Fuller argued that this complaint functioned as a waiver of sovereign immunity because the bankruptcy court suit involved the transaction over the Falcon.

Comision de Contratos, 923 F.2d 380, 385 (5th Cir.1991).

[5]Counsel informed us at oral argument that the bankruptcy action has since been dismissed.

Fuller further argued that, because the PCGG was an agent of the Republic, the waiver extended to the Republic. Thus, fuller contended, the appeal was moot and this court should refrain from exercising its pendent appellate jurisdiction to decide any of the other issues. The PCGG and the Republic opposed the motion. On February 5, 1992, a panel of this court decided that Fuller's motion should be carried with the case.

On January 10, 1992, Fuller filed a motion to supplement the record with documents filed by the Republic in the bankruptcy action. These documents included the Republic's motion to dismiss a third-party complaint which had been filed by fuller in that action, and the attachments to that motion.[6] One of the

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[6]The bankruptcy action had been filed only by the PCGG against Fuller. Fuller impleaded the Republic.

attachments was the Republic's complaint against Cojuangco in the Sandiganbayan. Paragraph 17 of the complaint stated that Fuller was "the buyer of the [Falcon] from the plaintiff." Fuller asserted in its motion to supplement that this complaint constituted a judicial admission of the Republic's status as seller of the airplane. On February 5, this court granted Fuller's motion to supplement the record.

II.

We must first decide whether to grant Fuller's motion to dismiss the appeal as moot. Normally, an appeal becomes moot when, for whatever reason, there is no longer any case or controversy. See ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 (5th Cir. Unit B 1981). Fuller's motion, however, argues that mootness arises from a waiver of sovereign immunity

which occurred after the district court's decision. This is really an argument which goes to the substance of the waiver question. although Fuller may be arguing that the appeal is moot, it is simply pointing to another reason why we should find a waiver of sovereign immunity. We need not address the merits of the waiver argument, however, because there is ample support for the district court's conclusion that the sale of the Falcon fell within the commercial activities exception to the FSIA (at least with respect to the PCGG). Thus Fuller's motion is itself moot.

III.

[2] We next confront the district court's decision that the Republic could be held liable under an agency theory for the acts of the PCGG. The district court articulated two separate rationales for

imputing liability to the Republic. First, the court observed that if the PCGG was not an agent of the Republic, it did not satisfy the definition of a "foreign state" under § 1603, and thus would not be entitled to a presumption of immunity. Later in the opinion, the court analyzed specific record evidence to conclude that there was an agency relationship. The court relied on (1) a letter from the PCGG to Fuller indicating that the PCGG had authority to sell on behalf of the government; (2) the fact that the proceeding to seize the Falcon in the Sandiganbayan was initiated in the name of the Republic; (3) the fact that the republic filed a certiorari petition in the Philippines Supreme Court in proceedings involving the propriety of the seizure and sale even though an action of the PCGG was at issue in the case. The court then

turned to five factors suggested in Bancec for determining whether an instrumentality of a foreign government functions as the alter ego of the government.[7] The court pointed to the facts that the Philippine government created and defined the mission of the PCGG, funds from the national treasury were set aside for the PCGG's expenditures, the PCGG is empowered to obtain the assistance of all governmental entities in carrying out its mission, and

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[7]The district court distilled the following five factors from Bancec: (1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations. The Bancec opinion does not, however, set forth these factors as part of a "test" for determining agency status.

funds recovered by the PCGG would go to the Republic. Although in the court's opinion "the government does not control the PCGG's day-to-day activities," the level of interrelationship evidenced by the above factors enabled the court to conclude that the Republic and the PCGG were jointly liable for the conduct of each other.

The district court's first rationale--the PCGG is a foreign state under the FSIA, so it is an agent for liability purposes--confuses two distinct issues. Section 1603 defines the universe of entities entitled to statutory sovereign immunity.[8] This is

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[8]Section 1603 provides, in relevant part:

> For purposes of this chapter--
>
> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity--
>
> (1) which is a separate legal

completely different from the question whether a foreign state and its agency or instrumentality are alter egos for purposes of substantive liability. Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 176 n. 5 (5th Cir. 1989). "[T]he level of state control required to establish an 'alter ego' relationship is more extensive than that required to establish FSIA 'agency.'" Id; see also Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 448 (D.C.Cir.1990). Thus, the mere fact that the PCGG fit within § 1603's definition of a foreign state does not bear on the issue here.

[3] The district court's second

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person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof....

rationale was derived from the correct legal standard, but we are not convinced that the court could determine alter ego status on the current state of the record. Instrumentalities of foreign governments are presumed to retain their separate juridical status, Bancec, 462 U.S. at 627, 108 S.Ct. at 2600, so the burden of proving an agency relationship which would enable Fuller to hold the Republic liable on a contract signed by the PCGG fell upon Fuller. Hester, 879 F.2d at 176; De Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984), cert. denied, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985). Cf. Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd., 959 F.2d 49 (5th Cir.1992). Bancec remains the seminal case on the circumstances under which American courts may disregard the separate status of instrumentalities

created by foreign governments. In Bancec the Court held that, in a suit brought by Cuba's state-owned bank (Bancec) against Citibank to recover on a letter of credit, Citibank could assert a setoff against assets that had been expropriated by the Cuban government. Although the Court recognized that legal respect for the separate nature of government instrumentalities is essential to "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration," and found support for a presumption of separateness in the legislative history of the FSIA, 462 U.S. at 626, 103 S.Ct. at 2605, equitable principles drawn from corporate law required it to disregard the "corporate form." Bancec was dissolved before Citibank asserted its setoff, the

Court pointed out, so any benefit from disallowance of the setoff would accrue solely to the Government of Cuba. Id. at 631-32, 103 S.Ct. at 2602. The Court made clear, however, that it had not established any "mechanical formula" for evaluating efforts to disregard the separate status of government instrumentalities, but instead was relying on equitable principles applicable in particular to cases in which foreign governments seek to obtain the benefit of American courts. Id. at 633, 103 S.Ct. at 2603.

The actual holding of Bancec, therefore, establishes only that a court must be sensitive to the extent to which the foreign government will be the real beneficiary of litigation. The broader principles upon which Bancec was based--particularly the principle of disregarding the corporate form in instances where

respecting it would lead to injustice--are undoubtedly relevant whenever a plaintiff seeks to disregard a foreign government instrumentality, but we perceive in the district court's opinion and the briefs of the parties an effort to create and apply the kind of mechanical formula the Supreme Court rejected.

Our precedent since Bancec indicates that, in addition to the equitable principles discussed by the Supreme Court, we look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government. Hester, 879 F.2d at 178, 181. In Hester, the plaintiff, an American corporation, brought suit against the Republic of Nigeria, a government-

created corporation (NGPC), and one of the states of Nigeria, after a farming joint venture it had entered into with the NGPC and the state went sour. Hester appealed only the district court's dismissal, for lack of subject matter jurisdiction, of its breach of contract claim against Nigeria. Thus, the issue before this court was whether the district court had erred in refusing to disregard the separate status of the NGPC and Nigeria. After reviewing the Bancec principles, we cited with approval the decision in Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 616 F.Supp. 660 (W.D.Mich.1985), in which the court focused on the fact that the government had assumed day-to-day operation of the instrumentality it owned.[9] Hester,

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[9]In Kalamazoo, a government-owned corporation was not longer

879 F.2d at 178. We determined that the issue was highly fact-bound, and so went on to review in detail the facts upon which the district court had based its conclusion.

Some of the relevant findings[10] were that Nigeria owned 100 percent of NGPC's stock; NGPC's employees were not Nigerian civil servants; no official of Nigeria was involved in negotiation of the contract; NGPC generated its own income from commercial and government loans; Nigeria exercised no voting rights in the joint

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distinguishable as a separate entity when the majority of the instrumentality's stock had been expropriated, the government had required that all checks in excess of a certain amount be signed by a government-appointed director, a governmental agency was
required to approve all invoices for shipments exceeding a certain amount, and the government generally exercised direct control over its operation. Hester, 879 F.2d at 178.

[10]None of the findings were clearly erroneous. Hester, 879 F.2d at 180.

venture set up by the contract; and documents generated during the contract dispute showed that Nigeria considered NGPC entirely separate. In addition, documents reviewed by the district court showed that the Nigerian Federal Ministry of Agriculture exercised general supervisory control over the NGPC but was not involved in day-to-day operations. Id. at 179. We rejected Hester's contention that (1) documents which reflected the involvement of the Federal Ministries of Agriculture and Finance in obtaining a letter of credit for the project and (2) documents stating that NGPC "represents" Nigeria in pursuing agricultural policies revealed Nigeria's control. Id. at 180. In concluding that there was no alter ego relationship, we pointed out that Nigeria's ownership of 100 percent of NGPC stock and appointment of NGPC's Board of Directors was not

dispositive,[11] and that the evidence did not reveal day-to-day control by the government. This conclusion was buttressed by analogizing to agency law: "[n]one of the documents prepared by Nigeria ever communicated that NGPC represented it beyond the extent that all corporate entities represent their shareholders." Id. at 181.

The Republic argues that its absence from the negotiations and from the contract to sell the Falcon immunizes it against liability. Fuller responds primarily by referring to the documents cited by the district court, and it has added additional documents in the supplemental record allegedly showing the Republic's

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[11]Other courts have recognized that 100 percent ownership of an instrumentality set up as a corporation is not dispositive. Hercaire Int'l. Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir.1987); Foremost-McKesson, 905 F.2d at 448.

involvement in the sale. we are not convinced, however, that the record in this case was sufficiently developed to enable the district court to make its findings. Neither the executive orders creating the PCGG (on which the district court relied) nor the documents filed by the Republic in the Sandiganbayan in connection with the seizure of the Falcon (the documents in supplemental record), tell enough, by themselves, about the relationship between the Republic and the PCGG to allow a conclusion of alter ego status. All of these documents obviously have relevance to this issue, but they do not have the dispositive effect ascribed to them by the district court and Fuller. Significantly, the PCGG and the republic have not had an opportunity to offer evidence about their relationship, a the district court made its determination solely from the documents

submitted with the motion to dismiss. In the absence of an opportunity for the parties to flesh out the structure of their relationship, we are hesitant to rely solely on the original orders creating the PCGG and documents filed in the Supreme Court of the Philippines. Unlike in Hester, this record does not contain the quantity or quality of evidence that would enable us to affirm or reverse the district court outright. Therefore, we must remand for further factfinding about the involvement of the republic in the affairs of the PCGG. See Foremost-McKesson, 905 F.2d at 448 (remanded fur further findings on principal-agency status); cf. Williams v. Tucker, 645 F.2d 404, 413 (5th Cir.) (district court may hear written and oral evidence in order to determine factual issues which determine jurisdiction), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70

L.Ed.2d 212 (1981); Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990) (plaintiff may engage in discovery with respect to jurisdictional issues under the FSIA).

IV.

The need for further factual development on the issue of the agency relationship between the PCGG and the Republic does not, however, affect our ability to review the district court's conclusions concerning the sovereign immunity of the PCGG. The PCGG signed the contract with Fuller and is a foreign state as defined in 28 U.S.C. § 1603. We therefore proceed to consider the applicability of the FSIA to the action against the PCGG.

[4-7] We review the district court's conclusions about sovereign immunity de novo. Stena Rederi AB v. Comision de

Contratos, 923 F.2d 380, 386 (5th Cir. 1991). Under the FSIA, foreign states and their agencies and instrumentalities are immune from suit in the courts of the United States except as otherwise provided in the Act. 28 U.S.C. § 1604. A failure to satisfy the statute's exceptions deprives the district court of subject matter jurisdiction. Stena, 923 F.2d at 386; Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 288 (5th Cir. 1989) (per curiam). The foreign state always has the burden of persuasion on immunity. Once the state makes a prima facie showing of immunity, the plaintiff seeking to litigate in the United States has the burden of coming forward with facts showing that an exception applies. Id. at 289 n. 6.

Section 1605 contains the exceptions to sovereign immunity relevant in this case. It provides, in part:

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and

that act causes a direct effect in the United States.

We find that the § 1605(a)(2) exception (the commercial activities exception) applies in this case, and therefore do not discuss Fuller's argument about waiver.

In order for an American court to exercise jurisdiction over the PCGG under the commercial activities exception, fuller's suit must be based upon "commercial activity" which has at least one of the three jurisdictional connections with the United States set forth in § 1605(a)(2). Stena, 923 F.2d at 386; Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985). As we explained in Stena, "[n]ot only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of

action and the commercial acts of the foreign sovereign." 923 F.2d at 386; see also United States v. Moats, 961 F.2d 1198, 1205-06 (5th Cir. 1992) ("this lawsuit must be based on commercial activities that are connected to the United States in the manner described by the statute") (emphasis in original); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir.1984); America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 796 (9th Cir. 1989).

A. Commercial Activity

[8] The PCGG initially argues that the contract for the sale of the Falcon involved sovereign acts, not commercial activity. The statutory definition of "commercial activity" is "either a regular course of commercial conduct or a particular commercial transaction or act."

28 U.S.C. § 1603(d). Not surprisingly, courts faced with the question whether a particular act or series of acts constitutes commercial activity have ignored this circular definition and have, consistent with the intent of Congress, defined the concept on an evolving, case-by-case basis. See H.Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted in 1976 U.S. C.C.A.N. 6604, 6615 (federal courts are given "a great deal of latitude in determining what is a 'commercial activity' under the FSIA"); Segni v. Commercial Office of Spain, 835 F.2d 160, 163 (7th Cir. 1987).

Congress provided some guidance in the second sentence of § 1603(d), which directs us to look at the "nature" of an activity rather than its "purpose" in determining whether it is commercial. In Callejo, we adopted the view, first articulated in the

landmark FSIA cases of Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309 (2d Cir.1981), cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 81 L.Ed.2d 301 (1982), that an activity has a commercial nature for purposes of FSIA immunity if it "is of a type that a private person would customarily engage in for profit." 764 F.2d at 1108 n. 6 (citations omitted).[12] The Supreme Court recently approved of this approach. Republic of Argentina v. Weltover, Inc., ___ U.S. ___, 112 S.Ct. 2160, 2165-67, 119 L.Ed.2d 394 (1992). Consistent with this definition, courts typically hold that contracts for the procurement of goods and services are

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[12]Numerous other courts have utilized the Texas Trading test. See Rush-Presbyterian-St. Luke's Med. Center v. Hellenic Republic, 877 F.2d 574, 578 n. 4 (7th Cir.1989) (collecting cases), cert. denied, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989).

commercial rather than governmental in nature. See Texas Trading, 647 F.2d at 310 (contract for purchase of cement is commercial); Segni, 835 F.2d at 164-65 (employment contract under which employee would market country's wines is commercial); Rush-Presbyterian-St. Luke's Med. Center v. Hellenic Republic, 877 F.2d 574, 581 (7th Cir.1989) (contract for purchase of medical services is commercial), cert. denied, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1550 (D.C.Cir.1987) (contract for developing rural areas is commercial). In addition, the House Report repeatedly mentions contracts for the purchase of goods in the course of describing activities that courts should consider commercial.

Employing the Texas Trading test,

there is little doubt that the sale of the Falcon qualifies as commercial activity. The PCGG, however, argues that when we look to the broader activity behind the actual act of contracting, we will find that the contract was merely the end result of a truly governmental activity. Thus, it characterizes the relevant activity here as the recovery and sale of the ill-gotten gains of the Marcos regime, not the mere making (and alleged) breach) of a contract to sell an airplane. It analogizes its acts to the kind of acts we held to be sovereign in De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir.1985). In De Sanchez, the plaintiff sued to collect on a check issued by Banco Central, the Nicaraguan central bank. Banco Central had issued the check to enable the plaintiff to redeem a certificate of deposit she had purchased

from another bank, Banco Nacional. This transaction was necessary because only Banco Central had the dollars necessary to redeem the CD. At about the time the check was issues, the Sandinistas came to power and the new government ordered that a series of checks, including the one made out to the plaintiff, not be honored. 770 F.2d at 1387-88. We held that Banco Central's action in issuing the check was sovereign, not commercial. We explained:

> By law, Banco Central had overall responsibility for the control and management of Nicaragua's monetary reserves ... It was permitted to sell foreign exchange only for certain limited purposes ... Banco Central became involved with Mrs. Sanchez only in its official role of regulating the sale of foreign exchange. Its only authorized purpose in issuing the

> check was to maintain stable exchange rates and to allocate scarce foreign exchange reserves among competing uses. Consequently, in the current context, characterizing Banco Central's action as a sale of dollars is not merely incomplete--it is incorrect.

Id. at 1393 (citation omitted). We acknowledged that ascertaining the nature of Banco Central's acts involved some inquiry into the purpose of the acts, but pointed out that the purpose "defined the conduct's nature ... [Banco Central] was performing one of its intrinsically governmental functions a the Nicaraguan Central Bank." Id. As the initial issuance of the check was governmental, so was the later breach. Id. at 1394.

We contrasted the situation in Callejo, where a private bank which later

was nationalized, redeemed CDs in devalued foreign currency rather than in dollars in order to comply with new governmental exchange control regulations. The bank in Callejo merely complied with, rather than promulgated, the governmental policy, and thus its acts were deemed commercial. De Sanchez, 770 F.2d at 1393 n. 11. Similarly, we pointed out, in Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir.1980), the defendant was subject to suit because it breached its contract to provide the plaintiffs with a tour package as a result of a separate governmental decision to deny the plaintiffs entry to the country. De Sanchez, 770 F.2d at 1394 n. 11.

De Sanchez represents the unusual case where it is extremely difficult to separate the "nature" and "purpose" inquiries. This case, by contrast, involves a run-of-the-

mill contract which is in all respects indistinguishable from a contract entered into between two private entities to sell an airplane. Whatever the conceptual or theoretical difficulties inherent in distinguishing between the "nature" and "purpose" of various commercial activities, the statutory language commands that we do so. Weltover, 112 S.Ct. at 2167. Only once, in De Sanchez, has this court found it necessary to look to the purpose of a transaction to assist it in determining whether the § 1605(a)(2) exception applies. The De Sanchez decision, however, involved commercial acts which represented the real-world manifestation of the "public" or "governmental" act of rationing the supply of foreign currency. Although issuing a check is the type of act that private entities perform innumerable times for profit, see Callejo, 764 F.2d at 1108 n. 6,

private entities cannot and do not make policy decisions concerning the rationing of a country's remaining foreign currency reserves in the course of issuing checks. As the De Sanchez court explained, the mere issuance of the check was a governmental decision. 770 F.2d at 1393. Similarly, courts have found certain activities governmental rather than commercial for purposes of the FSIA even when they are identical to activities in which private parties engage. See, e.g., MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C.Cir.) (country's remodelling of chancery building is not commercial because operation of diplomatic buildings is sovereign activity), modified on other grounds, 823 F.2d 606 (D.C.Cir.1987).

Looking to the PCGG's mandate to recover Marcos's ill-gotten wealth as the defining aspect of this transaction would

impermissibly involve us in an analysis of the purpose behind the transaction. The mere fact that we can draw a causal connection between the sovereign act and the commercial activity is irrelevant, for every contract into which a foreign sovereign enters theoretically can be traced to a public purpose. Callejo, 764 F.2d at 1109; see also Rush-Presbyterian-St. Luke's, 988 F.2d at 581. As directed by Callejo, we must look at the gravamen of the complaint. Here, it is the PCGG's refusal to defend according to a contractual obligation, no the sovereign act of recovering Marcos's wealth, that forms the basis for the suit.

Our conclusion that the PCGG's act of contracting was commercial rather than sovereign leads us to conclude further that the actual act upon which this suit is based--the breach of the contract--also was

a commercial act. See Callejo, 764 F.2d at 1101 (selling of CDs and breach of obligation under it were both commercial acts); Arango, 621 F.2d at 1371 (selling of tour package and breach were both commercial acts). The nature of the initial contract perhaps is not necessarily dispositive on the question of breach; theoretically, the government itself could have ordered the PCGG not to defend Fuller in the Arkansas action as an act (or weapon) of foreign policy. See Carey v. National Oil Corp., 453 F.Supp. 1097 (S.D.N.Y.1978) (country's inducement of breach of privately-made contracts was sovereign where done for foreign policy purposes), aff'd on other grounds, 592 F.2d 673 (2d Cir.1979). But there is no suggestion here that there were any public policy reasons behind the PCGG's refusal to abide by the Deed of Sale. The act of

breaching thus is consistent with the original act of contracting: both were commercial activities.

B. Jurisdictional connection with the United States

[9] The PCGG also challenges the required jurisdictional connection to the United Sates. Focusing solely on the third clause of § 1605(a)(2), it asserts that the mere fortuity that Fuller lost money in the United States as a result of the alleged breach is not enough to satisfy this circuit's requirement that a breach of contract have a "substantial effect" in the United States as a "direct and foreseeable result" of conduct outside the United States. Zernicek v. Brown & Root, Inc., 826 F.2d 415, 419 (5th Cir.1987), cert. denied, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988). Even if it had reason to expect that Fuller would initially take

the aircraft to the United States, the PCGG says, it was Fuller's unilateral decision to do so and Faysound's unilateral decision to bring suit to try title in the United States. These events, the PCGG argues, were not a foreseeable result of the contract; litigation in the Sandiganbayan was a more foreseeable occurrence.

Employing the Zernicek test, we would have little difficulty concluding that the PCGG's acts had a direct effect in the United States. Fuller was forced to expend substantial sums of money defending its title. The Deed of Sale does not restrict the courts in which the PCGG is obligated to defend Fuller, and the Sandiganbayan would be the least foreseeable forum for litigation because (1) that court only hears claims concerning title to seized property, and (2) it appears that only the PCGG has the authority to file actions in

that court. Moreover, it clearly was foreseeable that Fuller, and American corporation, would transport the Falcon to the United States and thus be forced to defend a quiet title suit here. The PCGG demonstrated its awareness of this by arranging for transport permits to the United States and executing an FAA Bill of Sale.

Subsequent to oral argument, however, the Supreme Court clarified the test to be used in determining whether a commercial activity outside the United States has a direct effect in the United Sates. The Court indicated its disapproval of the Zernicek standard, rejecting the suggestion that § 1605(a)(2) "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" Weltover, 112 S.Ct. at 2168. Instead, the Court held, the proper test is that articulated by he Second

Circuit: "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity[.]'" Id. (citing Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir.1991)) (ellipsis in original). Using this more lenient standard, the Court in Weltover held that Argentina's unilateral rescheduling of the maturity dates on government-issued bonds had direct effects in the United States where the bondholders had designated their New York accounts as the place of payment.

If anything, Weltover strengthens our conclusion in this case. The PCGG agreed to "defend and hold harmless [Fuller] from any and all claims whatsoever, including but not limited to adverse claims...." This language obviously includes Faysound's quiet title action in Arkansas. As a direct consequence of the PCGG's refusal to provide Fuller with a defense in the

Arkansas action, fuller expended considerable sums of money to defend itself. Thus, the PCGG's commercial act caused a direct effect in the United States an the PCGG is not immune from suit.

V.

[10,11] The defendants also argue that the act of state doctrine bars this lawsuit. This doctrine limits, for prudential rather that jurisdictional reasons, the adjudication in American courts of the validity of a foreign sovereign's public acts. See W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404, 110 S.Ct. 701, 704, 107 L.Ed.2d 816 (1990); Callejo, 764 F.2d at 1113. As the invocation of an act of state defense does not call into question federal jurisdiction, the district court's ruling on the issue is not a part of the

immediately appealable order denying sovereign immunity. In the exercise of our discretion and in the interest of judicial economy, however, we may consider claims under our pendent appellate jurisdiction that are closely related to the order properly before us. Metlin v. Palastra, 729 F.2d 353, 355 (5th Cir. 1984); see also Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir.1990); Charles A. Wright, et al., 16 Federal Practice and Procedure § 3937, at 269 (1977 & Supp.1992). Cf. Myers v. Gilman Paper Co., 544 F.2d 837, 847 (5th Cir.1977) (related issues may be decided on appeal from order granting, denying, dissolving or modifying injunction). We exercise this power with caution, Metlin, 729 F.2d at 355, but here it is appropriate because the act of state issue is closely related to the issue of sovereign immunity.

[12, 13] The act of state doctrine serves to enhance the ability of the Executive Branch to engage in the conduct of foreign relations by preventing courts from judging foreign public acts. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964). When determining whether the act of state doctrine limits adjudication in American courts, we look not only to the acts of the named defendants, "but [to] any governmental acts whose validity would be called into question by adjudication of the suit." Callejo, 764 F.2d at 1113. The defendants assert that the act of state doctrine applies because resolution of this suit will call into question the Philippine government's grant of power to the PCGG to sequester and sell assets, the PCGG's official acts of sequestering and selling the Falcon, the Philippines Supreme Court's

decision that the PCGG had no authority to sell the aircraft and that the proceeds of the sale should be placed in escrow until title is determined, and various other official acts. Furthermore, the defendants argue that, even if there is an exception to the act of state doctrine for the repudiation of commercial obligations, it is inapplicable here because the PCGG's commercial acts were traceable to sovereign acts.

We share none of the defendants' concerns about the effect of this lawsuit. The district court need not adjudicate the validity of any of the public acts authorizing the PCGG to sequester and sell assets in the course of determining whether the PCGG wrongfully repudiated its contractual obligation. Apart from the decision of the Philippines Supreme Court, all of the public acts cited by he

defendants directly involve the creation and extent of the PCGG's authority to acquire and convey title. This lawsuit, however, has nothing to do with title to the aircraft, but is instead a damages action arising from a contract breach. Unlike in Callejo, where the nationalized bank's breach of its obligation to the plaintiffs was required by a governmental edict concerning currently exchange rates, no act of state forced the PCGG to refuse to defend Fuller. Finding a breach in Callejo would have called into question the official acts which directly caused the breach. Id. at 1115-16. There is no comparable connection here between any public acts and the PCGG's refusal to defend.

Moreover, finding a breach here would not call into question the decision of the Philippines Supreme Court, for that court

has merely determined that the PCGG had no authority to sequester and sell the Falcon without permission from the Sandiganbayan. In short, all the public acts and decisions cited by the defendants may be valid and yet the PCGG still may have breached the contract. Although public acts lurk in the background, the act of state doctrine "does not preclude judicial resolution of all commercial consequences stemming from the occurrence of ... public acts." Arango, 621 F.2d at 1381.

VI.

[14] The defendants next argue that the district court had no jurisdiction over Fuller's tort claim. Although the district court ruled on jurisdiction over Fuller's tort claim in an order separate from the order in which it held the commercial activities exception applicable, the second order also functioned as a denial of

immunity. As such, it is immediately appealable under the collateral order doctrine.

[15] The parties agree that the noncommercial tort exception to sovereign immunity, 28 U.S.C. § 1605(a)(5), is inapplicable. However, Fuller asserts that it can recover for tortious acts under the commercial activities exception of § 1605(a)(2). The defendants contend that Fuller is bound to the basis for jurisdiction over its tort claims which it originally pled (§ 1605(a)(5)) and that, because there is no jurisdiction under § 1605(a)(2) generally, there is no jurisdiction over the tort claim.

The defendants also argue that the district court erred in finding supplemental jurisdiction under 28 U.S.C. § 1367(a). That section, enacted ten days before Fuller filed its original complaint,

provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

Subsections (b) and (c) are not relevant here. However, the defendants argue, a federal statute, namely 28 U.S.C. § 1330(a), provides that the sole means of acquiring jurisdiction over a foreign sovereign is through operation of the FSIA. Thus, § 1367(a) is inapplicable.

We conclude that jurisdiction was properly exercised over Fuller's tort claim, at least with respect to the PCGG, under § 1605(a)(2). As discussed above, there is subject-matter jurisdiction under § 1605(a)(2) to hear the claim against the PCGG because the PCGG engaged in commercial activity with a direct effect in the United States. Section 1605 does not restrict the nature of the cause of action that may be asserted against a foreign sovereign over whom there is subject matter jurisdiction, but merely eliminates immunity "in any case ... in which the action is based upon" commercial activities. Thus, because there is jurisdiction over the PCGG, the district court may resolve a tort claim which is based on the PCGG's commercial activity.[13]

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[13]We note that the district court erred in applying 28 U.S.C. § 1347(a). Title 28 U.S. Code § 1330(a) restricts suits against foreign sovereigns to those cases in which the sovereign is not

We cannot affirm the order as to the Republic, however, because, as discussed above, further proceedings are necessary to determine whether the Republic can be held liable for the acts of the PCGG. Thus, we will reverse this order insofar as it holds that the court has jurisdiction over Fuller's tort claim against the Republic, and remand for further proceedings.

VII.

[16] Finally, the defendants quarrel with the district court's refusal to dismiss on grounds of forum non conveniens. This order is not immediately appealable

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entitled to immunity. Under § 1604, immunity exists except as provided in §§ 1605-1607. Thus, the exception contained in the first clause of § 1367(a) applies here. Moreover, the intent of § 1367(a) was to codify the doctrines of pendent and ancillary jurisdiction. H.R.Rep. No. 101-734, 101st Cong., 2d Sess., at 27-28, reprinted in 1990 U.S.Code Cong. & Admin.News 6802, 6873-6874; see also Siegel, Practice Commentary on § 1367 (in pocket part), at 219.

under the collateral order doctrine, however, as the need for an appellate court to examine factual and legal issues involved in the underlying dispute would often enmesh it too deeply in the merits of the action. Van Cauwenberghe v. Biard, 486 U.S. 517, 529, 108 S.Ct. 1945, 1953, 100 L.Ed.2d 517 (1988).

We do not think it appropriate to exercise our discretion to resolve this issue under our pendent appellate jurisdiction. The facts to which we look in reviewing a district court's forum non conveniens decision are not closely related to the considerations involved in reviewing decisions concerning either sovereign immunity or the act of state doctrine. A forum non conveniens inquiry involves an assessment, under a narrow standard of review, of the district court's conclusion about the most convenient place for trial.

See In re Aircrash Disaster Near New Orleans, 821 F.2d 1147, 1162, 1166 (5th Cir.1987) (en banc), vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989). As indicated in the opinion of the district court, the decision involves the weighing of a mix of private and public interests, keeping in mind that the plaintiff's choice of forum is usually to be respected. The private interests include ease of access to sources of proof; the availability of compulsory process for compelling attendance of unwilling witnesses; and the costs of obtaining the attendance of willing witnesses. Id. (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947)). The public interests include the extent to which congestion will slow trial of the

case; the interest in having controversies resolved in a local forum; the familiarity of the court with the governing law; and the unfairness of burdening citizens in an unrelated forum with jury duty. Id. at 1162-63. Of central importance in this case is the threshold question whether there exists an alternative forum. See id. at 1164; Piper Aircraft Co. v. Reyno, 454 U.S. 285, 254 n. 22, 102 S.Ct. 252, 265 n. 22, 70 L.Ed.2d 419 (1981).

As detailed above, the sovereign immunity issue in this case raised questions of the agency relationship between foreign governments and their instrumentalities, the characterization of certain acts as commercial or sovereign, and the effects of those acts in the United States. The act of state issue raised similar questions concerning the characterization of certain acts as public

and sovereign or private and commercial. While the forum non conveniens issue may appear related in that it essentially involves a judgment as to whether this lawsuit should be heard in a court of the United States, that comparison is too general a basis for invoking a jurisdictional doctrine which is used only sparingly and with great caution. Sovereign immunity and the act of state doctrine represent expressions by the legislative and judicial branches of limits on suits against foreign sovereigns as sovereigns. Each has roots in the notion that our foreign policy interests are best served when courts exercise caution in extending their adjudicatory powers to foreign governments. See Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-89, 103 S.Ct. 1962, 1967-69, 76 L.Ed.2d 81 (1983) (sovereign immunity); W.S.

Kirkpatrick, 493 U.S. at 404, 110 S.Ct. at 704 (act of state doctrine). Forum non conveniens, on the other hand, deals with the more mundane matter of trial convenience and involves a balancing of interests totally unrelated to the conduct of foreign policy. We think it inappropriate to reach out and decide the forum non conveniens issue in a case in which our appellate jurisdiction is carefully defined by concerns about enforcing the immunity of foreign sovereigns from litigation.

VIII.

For the foregoing reasons, the order of the district court entered on April 18, 1991, is AFFIRMED as to the PCGG. This order is REVERSED as to the immunity of the Republic of the Philippines, and the case is REMANDED to the district court for further proceedings consistent with this

opinion. The order of the district court entered on July 9, 1991, is AFFIRMED as to Fuller's tort claim against the PCGG; REVERSED and REMANDED with respect to the Republic; and the defendants' appeal with respect to the forum non conveniens holding is DISMISSED without prejudice.

Supreme Court, U.S.
FILED
NOV 16 1995
OFFICE OF THE CLERK

(2)

No. 95-721

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE REPUBLIC OF THE PHILIPPINES, AND
THE PHILIPPINES PRESIDENTIAL COMMISSION
ON GOOD GOVERNMENT,

Petitioners,

v.

WALTER FULLER AIRCRAFT SALES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 16, 1995

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QUESTION PRESENTED

Whether the Fifth Amendment's due process clause was violated where the Petitioners raised as a limitation on damages their interpretation of a contract provision, were permitted to brief and argue their position fully, and to support it through exhibits, affidavits and live testimony, but were ultimately unsuccessful in persuading the District Court and the Circuit Court that they were correct.

RULE 29.6 LISTING

Walter Fuller Aircraft Sales, Inc. is a Texas corporation with no parent companies and only one subsidiary, which is wholly owned.

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STATEMENT OF THE CASE

This case grows out of the sale of an airplane by the Philippines Presidential Commission on Good Government, a part of the executive branch of the government of the Republic of the Philippines, to Walter Fuller Aircraft Sales, Inc. ("Fuller").[1/] The facts leading up to the suit and the early stages of the litigation are fully and accurately set forth at pages 1377 through 1379 of the opinion of the United States Court of Appeals on interlocutory appeal, reported at 965 F.2d 1375 (5th Cir. 1992). This statement of facts is incorporated herein by reference.[2/]

[1/] Both petitioners will be referred to jointly as "the Philippines", and when necessary to separate them, as the "Republic" and the "PGCC".

[2/] The opinion is reproduced as "Appendix E" to the Petition for Writ of Certiorari. The relevant pages of Appendix E are 4 through 16.

However, in order to respond to the arguments advanced by the Philippines, some additional explication is required.

Fuller filed this action against the Philippines for breach of contract, breach of warranty of title, and other relief. Subsequently, a claim for fraud was added. The Philippines moved to dismiss asserting the lack of subject matter jurisdiction. In support of their motion, they relied, inter alia, on Article V(b) of the Deed of Sale, claiming that it limited Fuller's remedy to recovery of the sale price (R. 212). In their Reply in support of the same motion, they repeated this assertion (R. 425). The District Court denied the motion to dismiss and rejected such a cramped construction of the Deed, observing that the "clear language" of the Deed of Sale rendered the Philippines' construction "plain wrong" (R. 481 & n.26).

The Philippines took an immediate appeal to the United States Court of Appeals for the Fifth Circuit, which rendered a decision, affirming in part, and reversing and remanding in part for further factual development on issues related to jurisdiction. See 965 F.2d 1375.[3]/ The Court of Appeals also had no difficulty interpreting Article V(b) of the Deed of Sale, describing the meaning of its language as "obvious[]". 965 F.2d at 1387, App. B to Petition for Writ of Certiorari at 51.

On remand, Fuller filed a motion for partial summary judgment which raised, among other matters, the appropriate

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[3]/ Ultimately the District Court found that it had jurisdiction over both the Republic and the PCGG, see Appendix B to Petition for Writ of Certiorari at 33-37, and no challenge to that finding was raised in the second appeal to the Fifth Circuit or in the Petition for Writ of Certiorari.

measure of damages. Although on notice of this argument, the Philippines elected not to address it, relying instead on the affirmative defense of illegality.[4]/

The District Court granted partial summary judgment, holding that the PGCC had breached its indemnity agreement with Fuller, and went on to opine that:

> As a result of the PCGG's breach of its indemnity agreement, Fuller is entitled to damages in the amount of the market value of the Falcon, as well as all expenses including attorney's fees, incurred as a result of the Faysound Action.

(R. 883-884). The Philippines moved to set aside this grant of partial summary judgment, advancing as one argument, that Article V(b) of the Deed of Sale limited damages to return of the purchase price. This motion was denied.

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[4]/ The District Court properly rejected this "defense" and it was not pursued on appeal to the Fifth Circuit.

Shortly before trial, the Philippines again raised the issue by Motion for Reconsideration/Motion in Limine (R. 1457) which included a factual offer of proof (R. 1469). The motion was opposed, and the Philippines filed both a Reply (R. 1488), and a Supplemental Brief with numerous exhibits (R. Vol. 11). The District Judge heard oral argument on the matter and ruled as follows:

> I did study all of the briefing that was presented on this issue . . . and I'm going to overrule the Defendants' Motion for Reconsideration and overrule the Motion for Admission of Evidence on the interpretation. And as I indicated in prior opinions concerning this, this contract is clear and unambiguous and I'll stand by that ruling after reviewing it once again. . . .

(Tr. I-3, lines 10-17) (emphasis added). The case proceeded to trial before the District Court, sitting without a jury.

As part of their defense, the Philippines called as a witness, Doreteo B. Daguna, the Filipino lawyer for Fuller who had negotiated the sale of the aircraft, and taken part in drafting the Deed of Sale. Daguna was permitted to testify concerning the meaning of the language of Article V(b) of the Deed, and about the drafting of the document, subject to Fuller's hearsay and parol evidence objections. Under similar reservations, the District Court heard testimony from Ismail Sanchez, an attorney who represented the Philippines in the negotiations. After hearing these witnesses' direct testimony, the District Court sustained Fuller's evidentiary objections. Moreover, when making its findings of fact, the District Court discredited the testimony of both. Appendix A to the Petition for Writ of Certiorari at 4-6, 29-30. Specifically as

to Daguna, the Court found that he "lied under oath". Id. at 4-5.

Upon completion of the trial, the District Court entered judgment in favor of Fuller in the amount of $14,928,457.39 for compensatory damages only. No punitive damages were awarded because they are barred by 28 U.S.C. § 1606. (Tr. 110; Appendix B to Petition for Writ of Certiorari at 38-39.)[5]/

On appeal, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the judgment below by brief unpublished opinion, 62 F.3d 396 (1995) (Table), (Appendix A to Petition for Writ

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[5]/ The reference to the Philippines' exposure to punitive damages at page sixteen of the Petition for Writ of Certiorari is a red herring. Fuller originally noted a cross-appeal from the District Court's denial of punitive damages, but the cross-appeal was dismissed on Fuller's motion.

of Certiorari). The Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

1. The Philippines assert that they were denied due process of law because the District Court ruled that Article V(b) of the Deed of Sale was unambiguous, without giving them notice and an opportunity to be heard. This contention is belied by reference to the record, which demonstrates that the Philippines had numerous opportunities to present their position on this matter. They briefed the issue extensively on several occasions, filed voluminous exhibits, made oral argument, and were even permitted to offer testimony at trial in support of their contention. The claim that they were denied due process is simply without basis.

The meaning of Article V(b) of the Deed of Sale was raised by the Philippines

themselves in support of their first substantive response to the lawsuit, a Motion to Dismiss for Lack of Jurisdiction. The Philippines argued, inter alia, that there was a lack of jurisdictional connection with the United States, and advanced their interpretation of Article V as a limitation on their obligations to Fuller (R. 212). In reply, they argued the same interpretation in support of their "Act of State" defense (R. 425).

After the District Court ruled against them, holding that the plain language of the contract did not support their interpretation (R. 481), the Philippines renewed the argument on interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. It was again rejected. Walter Fuller Aircraft Sales v. Republic of the Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992). Thus, in

the initial stages of the litigation, the Philippines themselves raised the meaning of Article V(b) of the Deed of Sale before two courts, and lost on both occasions.

Interpretation of Article V(b) was again squarely presented by Fuller's Motion for Partial Summary Judgment, filed shortly after the case was remanded to the District Court. In support of that Motion, Fuller argued that if the District Court were to hold that the Philippines had breached their indemnity agreement, Fuller would be entitled to the full measure of its damages (R. 848). The Philippines elected not to interpose Article V(b) as a limitation on damages, countering instead with the affirmative defense of "illegality". The District Court properly rejected this defense and granted Fuller's Motion, holding that Fuller was entitled to damages in the amount of the market value of the

aircraft, as well as expenses for breach of the indemnity agreement (R. 883-84).

Before trial, the Philippines brought their interpretation of Article V(b) back before the District Court on a Motion for Reconsideration/In Limine (R. 1457) which included an evidentiary offer of proof (R. 1469). After Fuller's Opposition, the Philippines filed both a Reply (R. 1488) and a Supplemental Brief supported by numerous exhibits (R. Vol. 11). The District Court heard oral argument on this Motion prior to trial, and after stating that it had "stud[ied] all of the briefing that was presented on this issue. . . .", again found the Deed of Sale to be "clear and unambiguous," and denied the Motion (T. I- 3).

Despite this ruling, during the trial the District Court received evidence offered by the Philippines from two

witnesses who were involved in the negotiation of the agreement and the drafting of the Deed of Sale. This testimony was taken subject to Fuller's hearsay and parol evidence objections (T. II-204, T. III-6). After hearing the testimony in full, the Court sustained these objections. At the close of the case, it discredited the testimony of both witnesses (T. III-90).

As demonstrated by the foregoing, the Philippines' claim that they were denied due process, is utterly without record support. They had multiple opportunities to address the issue by written and oral argument, and to support their contentions with exhibits, affidavits, and live testimony. The District Court permitted the Philippines every opportunity to persuade it to accept their interpretation of the Deed of Sale. There was no

procedural error, and no violation of due process.

2. Stripped of the constitutional rubric, the Philippines' argument amounts to no more than a claim that the District Court and the United States Court of Appeals misapplied Texas decisional law regarding the interpretation of contracts.

This Court has recognized that:

> The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Butner v. United States, 440 U.S. 48, 58 (1979). In the instant case, a District Judge for the Northern District of Texas, applying Texas decisional law, held that Article V(b) of the Deed of Sale was unambiguous and did not create a limitation on the damages Fuller could recover. A panel of the United States Court of Appeals

for the Fifth Circuit unanimously affirmed this decision. 62 F.3d 396 (1995) (Table) (Appendix A to Petition for Writ of Certiorari).[6]/

Where issues of state law enter into the judgments of federal courts, this Court has been

> . . . hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.

Bishop v. Wood, 426 U.S. 341, 346 & n.10 (1976). As demonstrated below, there is no

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[6]/ This panel included two judges from Texas, the Honorable Edith Hollan Jones, and the Honorable Robert M. Parker. Judge Parker served as a United States District Judge for the Eastern District of Texas from April of 1979 until elevation to the Circuit Court in June of 1994. In addition, the panel of the Fifth Circuit which heard the interlocutory appeal and also rejected the Philippines' interpretation of Article V, included two Texas judges as well, one a District Judge from the Southern District of Texas, sitting by designation pursuant to 28 U.S.C. § 292.

reason to depart from this traditional deference in the case at bar because the result reached by the District Court and affirmed by the United States Court of Appeals was not only reasonable, but also correct.

3. The District Court appropriately applied Texas law to conclude that Article V(b) of the Deed of Sale did not limit Fuller's remedies. Article V(b) of the Deed of Sale provides as follows:

> The SELLER [the Philippines] however, does hereby assume full responsibility, to defend and hold harmless the BUYER [Fuller] from any and all claims of all persons whosoever, including but not limited to adverse claims, charges, liens, and/or possible encumbrances that may be place [sic] on the title by reason of any act, contract or agreement entered into, prior to the date of this Deed of Sale, as the SELLER by virtue of this sale, has released subject aircraft absolutely free from any such claims, for if there be should arise, such claims are understood ipso facto directed

> against the proceeds of the sale that is deposited in escrow, and not anymore on the aircraft.

R. Ex 2. The Philippines unsuccessfully urged the Courts below to find this language ambiguous and to read it to limit Fuller's remedy to the recovery of the proceeds of the sale. The District Court found the provision "clear and unambiguous" (T. 1-3) and containing no such limitation. These rulings were correct.

Under Texas law,

> [a] contract is not deemed ambiguous merely because the parties have a disagreement on the correct interpretation.

REO Industries, Inc. v. Natural Gas Pipeline Co., 932 F.2d 447, 453 (5th Cir. 1991). Nor is a contract considered ambiguous because the parties disagree on "whether it is reasonably open to just one interpretation." D.E.W., Inc. v. Local 93 Laborers' International Union, 957 F.2d

196, 199 (5th Cir. 1992). Rather, where a contract is ". . . so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous." D.E.W., Inc., supra.

Article V(b) meets this test. It includes no language which imposes a limit on Fuller's remedies. The language can only be read as evincing the parties' agreement to treat third party claims against the aircraft as through they were "directed against the proceeds of the sale . . ." and not against the aircraft itself. In other words, it was the parties' intention to consider third party remedies as limited by the law of the Philippines. See R. Ex. 70, para. 20 (Affidavit of PCGG Commissioner DeLeon).

In the absence of ambiguity, the District Court looked to the language of the Deed of Sale itself to determine the

intention of the parties ". . . for it is objective, not subjective, intent that controls." Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1982). Therefore, where a contract is unambiguous, extrinsic evidence of the parties' intent is not admissible. Storm Associates, Inc. v. Texaco, Inc., 645 S.W.2d 579 (Tex. App. San Antonio 1982), aff'd, 691 S.W.2d 586 (Tex. 1985).

In the Courts below, the Philippines sought to turn the Texas law of contract interpretation on its head by offering inadmissible (and incredible) parol evidence, in an attempt to vary the plain language of an agreement, and in order to create an ambiguity where none existed. The District and Circuit Courts appropriately rejected this ploy.

4. Even if the lower courts were wrong in their conclusion that Article V(b)

is unambiguous as a matter of law, such an error would be harmless, and must be disregarded because it does not affect the substantial rights of the parties, 28 U.S.C. § 2111. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). Under Texas law if a contract is found to be ambiguous, its interpretation becomes a question of fact. Fireman's Fund Insurance Co. v. Murchison, 937 F.2d 204, 207 (5th Cir. 1991). In this case the District Judge, sitting as the trier of fact, heard the evidence offered by the Philippines on their interpretation of Article V(b) of the Deed of Sale, and rejected it on credibility and other factual grounds. Appendix A to Petition for Writ of Certiorari at 4-6, 14-16, 29-30.

These findings of fact were affirmed by the Court of Appeals, as they must be

applying Fed. R. Civ. P. 52(a), particularly since determinations based on credibility warrant even "greater deference to the trial court's findings." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985). In these circumstances review by this Court is inappropriate.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). As a factual matter, the District Court's decision turned on the construction of a specific contract, and the credibility of particular witnesses. Its findings were affirmed by the Court of Appeals, and the Philippines have made no showing of any error at all. Review by this Court is

unwarranted. United States v. Johnston, 268 U.S. 220, 227 (1925) (certiorari not granted for purposes of factual review).

CONCLUSION

Wherefore, respondent Walter Fuller Aircraft Sales, Inc. respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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